Supreme Court, U.S.
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No.

In the Supreme Court of the United States

CIGARETTES CHEAPER!,

Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY

AND

GMB, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit's determination that evidence of a defendant's ill intent has no relevance to either the *prima facie* case or the affirmative defenses in a § 2(a) Robinson-Patman claim involving secondary-line competition (which is directly contrary to the law in the Fourth, Eighth and Eleventh Circuits) contradicts the plain language of the statute, its purpose, and this Court's precedents interpreting it.

PARTIES TO THE PROCEEDING

The petitioner in this case is Cigarettes Cheaper!. The respondents are R.J. Reynolds Tobacco Company and GMB, Inc. (collectively referred to as "RJR").

RULE 29.6 STATEMENT

Petitioner Cigarettes Cheaper!, a California corporation, has no parent corporation, and no publicly held company holds 10% or more of Cigarettes Cheaper!'s stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. THE SEVENTH CIRCUIT'S DECISION REWRITES FEDERAL LAW BY ELIMINATING INTENT EVIDENCE FROM EVERY ASPECT OF A CLAIM UNDER THE ROBINSON-PATMAN ACT 9

A. Intent Evidence May Be Used to Establish the Requisite Threat to Secondary-Line Competition in a Robinson-Patman Prima Facie Case 9

B. The Seventh Circuit Misinterprets the Law Regarding the Role of Intent Evidence in Rebutting the Affirmative Defenses for a Robinson-Patman Claim 17

1. Intent Evidence Is Essential to Rebut a Claim That Actions Were Taken in Good Faith Under the "Meeting Competition" Defense 17

2. Intent Evidence Is Essential to Rebutting a Claim of Actions Taken in Good Faith Under the "Functional Availability" Defense 19

II. THE SEVENTH CIRCUIT'S DECISION CREATES A SPLIT AMONG THE FEDERAL COURTS OF APPEAL. 20

A. Other Circuits Consider Intent Evidence Relevant in a Secondary-Line Case Under the Robinson-Patman Act. 20

1. The Fourth Circuit Has Held That Intent Evidence Is Relevant, Particularly to the Good Faith Element of the "Meeting Competition" Defense 20

2. The Eleventh Circuit Has Held That Intent Evidence Is Relevant, Particularly to the Good Faith Element of the "Meeting Competition" Defense 22

3. The Eighth Circuit Has Held That Intent Evidence Is Relevant to Establishing the Likelihood of Injury to Secondary-Line Competition. 24

B. Among the Courts of Appeal, the Seventh Circuit Stands Alone in Eliminating Evidence of Intent From a Robinson-Patman Claim. 25

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

A.A. Poultry Farms v. Rose Acre Farms, Inc.,
881 F.2d 1396 (7th Cir. 1989) 25, 26

Alan's of Atlanta, Inc. v. Minolta Corp.,
903 F.2d 1414 (11th Cir. 1990) 8, 10, 14, 22, 23

Barr Labs. v. Abbott Labs.,
978 F.2d 98 (3d Cir. 1992) 11

Barry Wright Corp. v. ITT Grinnell Corp.,
724 F.2d 227 (1st Cir. 1983) 26

Boise Cascade Corp. v. FTC,
837 F.2d 1127 (D.C. Cir. 1988) 9, 10

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 9, 10, 13, 14

Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.,
79 F.3d 182 (1st Cir. 1996) 14, 16

Falls City Indus., Inc. v. Vanco Beverage, Inc.,
460 U.S. 428 (1983) 8, 9, 17, 18, 19, 21

FTC v. Fred Meyer, Inc.,
390 U.S. 341 (1968) 10

FTC v. Morton Salt Co.,
334 U.S. 37 (1948) 14, 19

FTC v. Sun Oil Co.,
371 U.S. 505 (1963) 10

Hasbrouck v. Texaco, Inc.,
842 F.2d 1034 (9th Cir. 1988) 15

Henry v. Chloride, Inc.,
809 F.2d 1334 (8th Cir. 1987) 11

Hygrade Milk & Cream Co. v. Tropicana Prods., Inc.,
No. 88C2861, 1996 WL 257581
(S.D.N.Y. May 16, 1996) 20

McGahee v. Northern Propane Gas Co.,
858 F.2d 1487 (11th Cir. 1988) 15, 16, 23, 24

Perkins v. Standard Oil Co.,
395 U.S. 642 (1969) 7, 12, 13

Rebel Oil Co. v. Atl. Richfield Co.,
51 F.3d 1421 (9th Cir. 1995) 14

Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.,
374 F.3d 701 (8th Cir. 2004) 24

United States v. U.S. Gypsum Co.,
438 U.S. 422 (1978) 17, 18

Utah Pie Co. v. Cont'l Baking Co.,
386 U.S. 685 (1967) 7, 9, 12

Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.,
546 U.S. 164, 126 S. Ct. 860 (2006) 10, 11, 13

STATUTES

15 U.S.C. § 13 ..... 1, 10, 17, 24

28 U.S.C. § 1254(1) 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Cigarettes Cheaper! ("CC") hereby petitions this Court to issue a writ of certiorari for review of the ruling of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the decision of the district court is reported at 462 F.3d 690 (7th Cir. 2006). *See* Petition Appendix ("Pet. App.") at 1a-17a. The September 15, 2006 Order of the Court of Appeals denying Cigarettes Cheaper!'s request for rehearing and suggestion for rehearing *en banc* is unreported but available at 2006 U.S. App. LEXIS 23811 (7th Cir. 2006). *See* Pet. App. at 18a.

JURISDICTION

The ruling of the Court of Appeals was entered on August 24, 2006. *See* Pet. App. at 1a. On September 15, 2006, the Court of Appeals denied Cigarettes Cheaper!'s request for rehearing and suggestion for rehearing *en banc*. *See id.* at 18a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. at 19a-21a) reproduces the relevant text of the Clayton Act, as amended by the Robinson-Patman Act ("RPA"), 15 U.S.C. § 13.

STATEMENT OF THE CASE

Proceedings in the District Court

R.J. Reynolds Tobacco Co. ("RJR") filed suit against Cigarettes Cheaper! ("CC") in the United States District Court for the Northern District of Illinois alleging violations of the Lanham Act. CC counterclaimed asserting various antitrust claims alleging that RJR: orchestrated a horizontal conspiracy among retailers and distributors to drive CC out of business; engaged in a vertical conspiracy with certain of its retail distributors to set retail prices;[1] and engaged in price discrimination in violation of sections 2(a) and 2(d) of the Robinson-Patman Act. R(173).[2] The Robinson-Patman Act claims were premised upon the assertion that RJR attempted to drive CC – a low-price, low-profit margin retailer of cigarettes manufactured by RJR and its competitors – from the market by offering lower pricing, greater discounts and more promotional support to retailers competing with CC. *Id.*

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[1] After discovery, RJR moved for summary judgment on CC's Sherman Act conspiracy counts. R(349). In its ruling, the district court expressly found that there was "some evidence of a conspiracy." R(372). The district court found that the conspiracy was vertical in nature, but did not acknowledge any of CC's evidence that the conspiracy was intended to affect price levels, and so held the per se standard was inapplicable. CC appealed from this ruling as well, but the Seventh Circuit did not address CC's argument that the conspiracy included a minimum resale price maintenance agreement such that the *per se* standard should have applied. We note that this Court recently issued a writ of certiorari on the question of whether the per se standard should be applied to a claim of vertical minimum resale price maintenance under the Sherman Act. *See Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, __ S. Ct. __, 2006 WL 2851385, 75 U.S.L.W. 3207 (U.S. Dec. 07, 2006) (No. 06-480).

[2] Citations to the record from the proceedings in the district court are designated "R(__)." The number in parentheses refers to the docket number.

In discovery, CC obtained extensive evidence supporting the allegation that RJR carried out its deliberate plan to drive CC out of business, a plan implemented largely because CC sold a high percentage of cigarettes manufactured by its competitor, Philip Morris ("PM"). That evidence showed that RJR had used the mechanism of price discrimination, funded by RJR and carried out with and through the cooperation of co-conspiring retailers, to take sales of RJR brand cigarettes away from CC and effectively terminate CC as a retailer of cigarettes. *See* Appellant's Brief on Appeal to the Seventh Circuit (hereinafter "Brief") at 13-22. RJR first calculated the point at which a CC store would break even and become profitable. *See* SA9, SA71-92; SA110.[3] Using this calculation, RJR then gave its retailers in proximity to CC sufficient additional promotional allowances, and in some cases funded huge buy-downs (a discount given by the manufacturer to the retailer that must be passed on to the consumer, dollar for dollar, *see* SA625) on its products, so as to greatly reduce the prices of RJR brands at those retailers for a discrete period of time. *See* SA35; SA66; SA88; SA186-94; SA583-85; SA195-215; SA219; SA221-24; SA229. RJR also instructed its conspirator retailers to temporarily reduce the price of PM cigarettes to below the retailers' cost, but to keep PM prices above a set minimum price to allow a $1.00 per carton advantage to RJR. SA186-94; SA231.

The evidence showed that RJR intended to use this price discrimination scheme to force customers of its brands and other brands to leave CC and buy their cigarettes at the conspiring retailers. *See* SA186-94; SA231-32; SA287-94; SA266; SA97; SA261-62. In RJR's own written words, it would "team up with retailers" to "shut down," "hurt," and

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[3] Citations to the separate appendix to the briefs on appeal to the Seventh Circuit are designated "SA__." The number following "SA" is the page reference.

"kill" CC "on the beach" – i.e., destroy CC before it could establish a profitable beachhead in the industry. SA5; SA22; SA23; SA35; SA231; SA273. The plan worked, and CC's resultant loss of sales to customers buying RJR brands (whose purchases represent 25% of the market) and customers of other brands prevented CC stores from reaching their break-even point, forcing CC stores out of business – after which the conspirators raised retail prices of RJR and PM brands to higher than pre-conspiracy prices. *See* SA191; SA221; SA552-54.

RJR cannot deny that the evidence of its price discrimination against CC: 1) came from the highest levels of the company; 2) was unambiguous; and 3) was *extensive.* The documents CC uncovered were not the random musings of a low-level, rogue employee in some buried email exchange – comments that might be interpreted as "competitive puffery." Rather, the documentary evidence of RJR's true intent came directly from high-level RJR executives charged with ensuring the future success of the company. *See* SA25-36 (Andrew Schindler, RJR's CEO); SA65-68; SA166-73; SA273 (Brian Stockdale, RJR's Vice President for Retail/Wholesale Marketing); SA21-24 (James Maguire, RJR's Executive Vice President of Sales and member of the Board of Directors); SA161 (Barbara Simkins, RJR's Regional Sales Manager for Northern California). Nor were the statements ambiguous or circumspect; they specifically stated that the intention was to "hurt," to "punish," to "shut-down," even to stop "new location success" and "kill" CC. *See* SA5 ("Punish Cheaper!'s"); *id.* ("Punish? – Hurt?"); SA665-77 ("shut [CC] down"); SA273 ("Next steps . . . Action Plan Against Stopping [CC's] New Location Success"); SA22 ("kill them [CC]"); SA35 ("Kill Them On the Beach."). Finally, CC had collected not one or two instances of such statements, but had discovered dozens of instances of these kinds of statements, *see supra,* 2-3; Brief at 9-23 (detailing the events

leading to, creation, and implementation of RJR's plan to "kill" CC); the discovery record was permeated by evidence of RJR's clear intent to discriminate against CC. [4]

Due to the potentially devastating effect of these documents, RJR moved *in limine* to exclude all of this evidence, arguing it was not relevant to establishing any of the claims or defenses at issue in a Robinson-Patman action. R(392). CC opposed the motion on various grounds. *See* Brief at 37-42. The district court granted the motion in part, reserving for trial whether CC could offer the evidence in rebuttal. SA880.

At trial, during its opening statement, case-in-chief and closing argument, RJR witnesses repeatedly referred to RJR's intent, motive and rationale for refusing to give CC its highest level of promotions and its most beneficial contract for the purchase of cigarettes. *See* SA653-54; SA657; SA644-47; SA639; SA619-20. These witnesses stated, on numerous occasions, that RJR had every good faith intention of dealing with CC and providing the same pricing and discounts it was providing to other retail distributors of its product. *See* SA653-54; SA657-58; SA644-47; SA639; SA619-20. CC argued vociferously at trial that it should be permitted to impeach RJR witnesses with evidence showing the contrary. *See* SA667-77. The district

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[4] This evidence showed that RJR and its favored retailers shared an interest in eliminating CC. Because CC sold PM's cigarettes for such a low price (SA42; SA97), CC was threatening RJR's market position (SA39-61), driving down the price RJR would be able to charge other retailers for RJR cigarettes in the future (SA97) *and* undermining the profit margin of those other retailers (SA42; SA148-53; SA158-60; SA185; SA548-49; SA545; SA547; SA582), RJR's favored purchasers. While one might dismiss this type of ill intent evidence as spirited rivalry when directed at a *competitor* (as the Seventh Circuit did, *see* Pet. App. at 7a), there is no legitimate and permissible justification under the antitrust laws for RJR to design and carry out a plan to destroy a particular retailer of its *own* products.

court denied CC's requests. *See* SA674-77. At the close of RJR's case, CC moved for permission to use the discriminatory intent evidence in its rebuttal case. R(616). The court again denied the motion – this time under the auspices of Federal Rule of Evidence ("FRE") 403, holding that such evidence was either "not relevant or so marginally relevant that any probative value was outweighed." SA674-77. Having heard none of the evidence refuting RJR's purported justifications, the jury found for RJR on the price discrimination claim. R(625).

Proceedings in the Circuit Court

CC appealed the decisions against it to the United States Court of Appeals for the Seventh Circuit. Oral argument was held on September 12, 2005 and on August 24, 2006, the circuit court issued its panel opinion. Pet. App. at 1a-17a. In its opinion affirming the district court's rulings with respect to the Robinson-Patman claim, the Seventh Circuit eliminated the role that evidence of RJR's actual intent should have played under § 2(a) of the Robinson-Patman Act – both in establishing the likelihood of injury to competition and in defeating the affirmative defenses proffered by RJR in support of its discriminatory pricing scheme. *Id.* at 10a-13a.

The Seventh Circuit stated that "a bad intent is not part of the plaintiff's *prima facie* case under § 13(a), and a 'good' intent (apart from its bearing on the statutory justifications) does not excuse price discrimination." *Id.* at 11a. Therefore, the court reasoned, CC's proffered evidence "could have played little role beyond confusing jurors" who were not "professional economists." *Id.* After admitting, however, that evidence of "good" intent plays some role *at least* with respect to the affirmative defenses, the Seventh Circuit nonetheless ruled that such evidence was irrelevant and that "[t]he district judge should have kept *all* claims

about motive or intent out of evidence." *Id.* Having determined that intent evidence has no relevance to a Robinson-Patman Act claim, and therefore no real probative value, the Seventh Circuit held that it was proper to exclude this evidence under FRE 403. *Id.* at 10a-11a. After reaching this conclusion – and *despite* the fact the jury had heard testimonial evidence from RJR witnesses regarding RJR's motive and "good" intent, without the benefit of CC's rebuttal of that evidence – the court of appeals affirmed the decision rendered in the district court on the Robinson-Patman claim. *Id.*

CC filed a motion for rehearing with a suggestion for rehearing *en banc*, which was denied on September 15, 2006. Pet. App. at 18a.

REASONS FOR GRANTING THE WRIT

By holding that evidence of the defendant's intent is irrelevant, regardless of whether such evidence is offered to establish a *prima facie* case based on injury to secondary-line competition or to rebut a defendant's claim that it was acting "in good faith" under one of the affirmative defenses, the Seventh Circuit has in effect rewritten the Robinson-Patman Act. In so doing, the Seventh Circuit has thwarted the intent of Congress and nullified the effect of the plain language of the Act.

This Court has long recognized that evidence of intent is relevant to a claim of price discrimination under the Robinson-Patman Act. *See Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685 (1967); *see also Perkins v. Standard Oil Co.*, 395 U.S. 642, 649 (1969). Furthermore, this Court has *never* held that evidence of ill intent is irrelevant in assessing whether a defendant was acting in good faith to "meet competition" or provide "functional availability" of lower prices, pursuant to the defenses recognized under the

Robinson-Patman Act. *See, e.g., Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983).

The Seventh Circuit's decision directly conflicts with the decisions of other circuits as to whether evidence of intent plays a role in an action under § 2(a) of the Robinson-Patman Act. Those circuits, like this Court, have uniformly recognized that intent is relevant in the context of a secondary-line competition case. *See Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1416-17, 1425-26 (11th Cir. 1990). In addition, not one Court of Appeals, other than the Seventh Circuit, has ruled that evidence of intent is *irrelevant* to establishing or rebutting a defendant's claim of good faith – whether in the context of "meeting competition" or in making the lower prices or promotional support provided to a favored purchaser "functionally available" to all. *See, e.g., id.*; *Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160, 163-64 (4th Cir. 1999).

The Seventh Circuit's decision that intent evidence is irrelevant in *all* types of Robinson-Patman Act claims is contrary to federal law and creates a split among the federal circuits. Furthermore, the Seventh Circuit's holding that intent evidence is irrelevant to establishing or rebutting the good faith element of the affirmative defenses runs directly contrary not only to the jurisprudence of this Court and the other federal courts of appeals, but also to the plain language of the statute and the intent of Congress in providing those affirmative defenses. By excluding intent evidence that will strengthen a plaintiff's *prima facie* case or rebut a defendant's assertions that it has acted in "good faith," the Seventh Circuit is applying the Robinson-Patman Act in a different manner than every other federal jurisdiction that has addressed this question.

I. THE SEVENTH CIRCUIT'S DECISION REWRITES FEDERAL LAW BY ELIMINATING INTENT EVIDENCE FROM EVERY ASPECT OF A CLAIM UNDER THE ROBINSON-PATMAN ACT.

The Seventh Circuit's ruling fundamentally alters the law of price discrimination in a manner that is neither supported by the statute or judicial precedent interpreting that statute. This Court long ago established that intent plays a role in a Robinson-Patman action. It held expressly in *Utah Pie* that "the existence of predatory intent might bear on the likelihood of injury to competition" in a Robinson-Patman action. 386 U.S. at 702. *Falls City* elaborated on this theme in the context of the affirmative defenses, stating that the "meeting competition" defense requires the seller to "show the existence of facts" and "demonstrate that its lower price was a good faith response to a competitor's low price." 460 U.S. at 451. This Court, in referring to the Sherman Act, the Clayton Act, and the Robinson-Patman Act, held that "[s]ales below cost *and anticompetitive intent* are elements of the violation of all three statutes." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 251 (1993) (emphasis added). The Seventh Circuit, however, has departed from these precedents, opining that evidence of anticompetitive intent is irrelevant in a Robinson-Patman action. *See* Pet. App. at 11a.

A. Intent Evidence May Be Used to Establish the Requisite Threat to Secondary-Line Competition in a Robinson-Patman Prima Facie Case

The Robinson-Patman Act's goal is to abolish unwarranted favoritism among all functional competitors, big or small, and it is "fairness, as Congress perceives it, that Robinson-Patman is all about." *Boise Cascade Corp. v.*

FTC, 837 F.2d 1127, 1146-47-(D.C. Cir. 1988); *see also Alan's of Atlanta*, 903 F.2d at 1422 (noting the Robinson-Patman Act seeks "evenhanded treatment"). The Act's objective is to assure "that businessmen at the same functional level . . . start on equal competitive footing so far as price is concerned," *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963), and "to assure that all sellers, regardless of size, competing directly for the same customers . . . receive evenhanded treatment from their suppliers." *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 356 (1968).

This Court has explained that "Robinson-Patman does not ban all price differences charged to different purchasers of commodities of like grade and quality; rather, the Act proscribes price discrimination only to the extent that it threatens to injure competition." *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, __, 126 S. Ct. 860, 870 (2006) (quotations omitted). To establish competitive injury in a § 2(a) Robinson-Patman Act claim, a plaintiff must show that: (1) the relevant products were sold in interstate commerce; (2) the products sold to the different retailers were of like grade and quality; (3) the seller discriminated in price between the favored and disfavored purchasers; "and (4) 'the effect of such discrimination may be . . . to injure, destroy, or prevent competition'" to the advantage of a favored purchaser, i.e., one who received the benefit of such discrimination. *Id.*, 126 S. Ct. at 869 (quoting 15 U.S.C. § 13(a)).

Evidence of intent is relevant to this last element of the *prima facie* case – that the effect of the discrimination may be to injure, destroy or prevent competition. *See id.* A plaintiff may not rely merely upon a difference in price to establish its *prima facie* case because that would make the fourth element of the *prima facie* case superfluous. *Brooke Group*, 509 U.S. at 229 (noting all the words of the RPA must carry adequate meaning). The fourth element, a

likelihood of harm to competition between the discriminating seller's customers, must be shown as well. *Volvo Trucks*, 546 U.S. 164, __, 126 S. Ct. at 869-70. Because the chances of a future market event occurring can be difficult to prove even through the best objective evidence, courts have long recognized that one way to prove a likelihood of such harm is to use evidence of subjective intent. *See, e.g., Barr Labs. v. Abbott Labs.*, 978 F.2d 98, 108 (3d Cir. 1992) ("In the absence of market data indicating actual competitive injury, a plaintiff may sometimes substitute evidence of a competitor's predatory intent from which competitive injury can be inferred."). Courts allow evidence of intent under the theory that the intention to bring about a certain result is probative of whether that result is possible or likely to occur. *See Henry v. Chloride, Inc.*, 809 F.2d 1334, 1344 (8th Cir. 1987) (explaining that the logic supporting the link between intent and competitive injury is that "an illicit intent accentuates the probability that a prohibited consequence will come to pass") (quotation and citation omitted).

There are three types of competitive injury that may give rise to a Robinson-Patman Act claim: primary-line, secondary-line, and tertiary-line. *Volvo Trucks*, 546 U.S. 164, __, 126 S. Ct. at 870. While primary-line cases involve conduct that injures competition between the discriminating seller and its direct competitors (i.e., a manufacturer and other manufacturers), the case currently before this Court is a secondary-line case. Secondary-line cases involve injury to the competition *among* a discriminating seller's customers, and these customers are typically categorized and referred to as "favored" and "disfavored" purchasers. *Id.*

This Court has long recognized the role that intent, particularly predatory intent, plays in establishing price discrimination under § 2(a) of the Robinson-Patman Act.

See Perkins, 395 U.S. at 649 (holding the jury was justified in awarding damages under Robinson-Patman based, in part, on evidence that the defendant was "aware that [plaintiff's] business was in danger of being destroyed by [defendant's] discriminatory practices"); *Utah Pie*, 386 U.S. at 702 ("Courts and commentators alike have noted that the existence of predatory intent might bear on the likelihood of injury to competition.").

In *Utah Pie*, the discriminating seller candidly admitted that it had sent an industrial spy into its competitor's plant to seek information that would be of use in convincing purchasers not to buy from the competitor. *Utah Pie*, 386 U.S. at 696-97. While the discriminating seller downplayed the role of any information it gained from the use of the industrial spy, this Court held that the jury needed to weigh the credibility of the defendant's explanations and that, even if the jury gave some measure of weight to the defendant's spin on events, the jury was not "foreclosed from considering the predatory intent underlying [the defendant's] mode of competition." *Id.* at 697. In rejecting the circuit court's opinion that there was insufficient evidence of a probable injury to competition, this Court concluded that intent evidence bearing on the question of whether a Robinson-Patman defendant's "behavior satisfied the test regarding competitive injury" is relevant and should not be ignored. *Id.* at 696.

In *Perkins*, an oil and gas retailer brought a Robinson-Patman claim against Standard Oil, claiming that Standard Oil was selling its oil and gas products to its branded dealers and other of Perkins' competitors at a lower price than it would sell the same products to Perkins. In this secondary-line case, Standard Oil's awareness of the effect its discriminatory pricing was having and its decision to continue its discriminatory practices nonetheless were deemed relevant by this Court. *Perkins*, 395 U.S. at 649.

The Court held that, in part, the "evidence that Standard officials were aware that Perkins' business was in danger of being destroyed by Standard's discriminatory practices" was "sufficient to sustain the jury's award of damages under the [RPA]." *Id.* If a jury may rely upon a defendant's mere *knowledge* of the predatory effect the defendant's discriminatory practices are having, then it should undoubtedly be able to consider evidence of a defendant's intent to actually *cause* the demise of a purchaser.

Though more recent opinions of this Court have minimized the role that intent evidence plays in proving one's *prima facie* case in a *primary-line* competition case, those opinions have no effect upon the role intent evidence continues to play in *secondary-line* cases. *See, e.g., Brooke Group*, 509 U.S. at 226 (confining its holding to "primary-line cases" under the Robinson-Patman Act).[5] Like the lower federal courts and certain commentators, this Court has reached the conclusion that, for primary-line competition cases, a more reliable indicator of the likely effect of a seller's discriminatory conduct is whether that seller is pricing its goods below some measure of cost for the favored purchaser. *See id.* at 220-26. Any price cut to a level above cost, this Court has reasoned, is actually good for primary-line competition (and, in turn, consumers) because it forces the seller's direct competitor to reduce its prices and maintain quality or face a reduced market share. *See id.* Because the law seeks to encourage such pro-competitive behavior, this Court has determined that the Robinson-

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[5] The most recent opinion of this Court addressing secondary-line competition, *Volvo Trucks*, does not address the subject of intent evidence or the role of such evidence in either establishing a *prima facie* case or rebutting one of the affirmative defenses. *See* 546 U.S. 164, 126 S. Ct. 860. The opinion of the Eighth Circuit in that case, however, does utilize intent evidence and those portions not affected by this Court's 2006 ruling will be discussed *infra* in Section II.

Patman Act does not reach primary-line competitive conduct that involves pricing above cost. *See id.* at 222-23.

This same rationale, however, does not apply to secondary-line competition cases. *See id.* at 229 (providing "the Robinson-Patman Act is phrased in broader, disjunctive terms," and "[f]or all the words of the [Robinson-Patman] Act to carry adequate meaning, competitive injury under the Act must extend beyond the monopoly setting"). A discriminatory seller need not reduce its prices below cost to kill – or at the very least, severely disable – a secondary-line competitor. *Alan's of Atlanta*, 903 F.2d at 1416 (though not designed to drive disfavored dealer out of business, defendant's program was designed to create a *de facto* vertical integration with favored dealers); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1444-46 (9th Cir. 1995) ("We have held that a secondary-line plaintiff can demonstrate antitrust injury if the price discrimination caused him to lose sales and profits; he need not demonstrate any injury to consumer welfare.").

Because a consumer in a rational market – with all other things being equal – is going to start purchasing the product from the retailer with the cheaper prices, a mere difference in price at which the discriminatory seller is providing its goods to the respective buyers will have the effect against which the Robinson-Patman Act is designed to protect. *See, e.g., FTC v. Morton Salt Co.*, 334 U.S. 37, 46-47 (1948) (finding the requisite harm to competition because it was "obvious" that the "competitive opportunities of certain merchants were injured when they had to pay . . . substantially more for their goods than their competitors had to pay"); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 192 (1st Cir. 1996) ("The theory of injury is generally that the defendant's lower price sales to the plaintiff's competitor (the favored purchaser) placed the plaintiff at a competitive

disadvantage and caused it to lose business."); *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1988) (describing evidence showing that customers switched gas retailers because of a relatively small difference in retail prices). In secondary-line cases (unlike in primary-line cases), the price of the goods in relation to the seller's cost says nothing about whether the discriminatory price is likely to cause injury to competition and, therefore, cannot be used to predict when such injury is likely to occur. Without this objective evidence "proxy" for the existence of predatory intent, the tribunal in a secondary-line case must rely heavily on subjective evidence of intent. The Seventh Circuit's opinion ignores this important distinction between primary-line and secondary-line competition cases.

As recognized by this Court and other federal circuits other than the Seventh Circuit, allowing subjective evidence of a defendant's intent is not in any way incompatible with allowing objective evidence on the same subject. *See, e.g., McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1496-1501 (11th Cir. 1988). Rather, the two should be used to complement each other and enhance a fact-finder's understanding of the specific context of the alleged violation. As the Eleventh Circuit stated in *McGahee*:

> Congress's exact intent when enacting the antitrust statutes as to what conduct established an antitrust violation is beyond the reach of human knowledge, but the statutes, their legislative histories, and common sense indicate that Congress intended for subjective evidence of a defendant's intent to be relevant. Predatory pricing provides only objective, circumstantial evidence of predatory intent. In determining how Congress intended proof

> to be made of antitrust violations, common sense suggests that objective, circumstantial evidence of prices and costs and direct and circumstantial evidence of subjective intent would both be important.

858 F.2d at 1500.[6] The court in *McGahee* concludes this passage of its opinion by stating that the circumstances leading to enactment of the antitrust laws, and in particular to the Robinson-Patman Act, "all make ignoring a defendant's subjective intent unsupportable." *Id.*

By transposing to *secondary-line* cases, without any analysis as to why it is appropriate to do so, the rationale for the reduced role that subjective intent evidence plays in *primary-line* cases, the Seventh Circuit's opinion stands in conflict with this Court's jurisprudence on the subject. Though this Court has never explicitly addressed the relative importance of the objective versus subjective evidence of a defendant's predatory intent in the context of a *secondary-line* case, a court of appeals should not take it upon itself to alter a well-established and generally applicable rule of law without clear guidance from this Court. *See, e.g., Coastal Fuel*, 79 F.3d at 193 (noting the First Circuit will not alter a well-established rule of law – in this instance, regarding the *type* of harm required in a secondary-line case – without direct and specific guidance from the Supreme Court). In doing so, the court below erred, because this Court's earlier precedents call for evidence of the defendant's intent to play a prominent role in determining whether injury to competition is likely to occur.

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[6] In this passage, the Eleventh Circuit draws an important distinction between "predatory intent" and "predatory pricing," noting that predatory pricing is merely "objective, circumstantial evidence" of the existence of predatory intent.

B. The Seventh Circuit Misinterprets the Law Regarding the Role of Intent Evidence in Rebutting the Affirmative Defenses for a Robinson-Patman Claim

1. Intent Evidence Is Essential to Rebut a Claim That Actions Were Taken in Good Faith Under the "Meeting Competition" Defense

Under the Robinson-Patman Act, a seller that engages in price discrimination has a defense based on § 2(b) of the Act, the so-called "meeting competition" defense. The "meeting competition" defense, one of two defenses relied upon by RJR in this case, is set forth in the statute itself:

> Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers *was made in good faith to meet an equally low price of a competitor*, or the services or facilities furnished by a competitor.

15 U.S.C. § 13(b) (emphasis added). By placing the words "in good faith" directly into the statute, the drafters made clear that to rely upon the defense, a defendant must establish that its actual intention in offering lower prices was to meet competition. *See, e.g., United States v. U.S. Gypsum Co.*, 438 U.S. 422, 453 (1978) ("[I]t is the concept of good faith which lies at the core of the meeting-competition defense[.]").

Furthermore, "the defense requires that the seller offer the lower price in good faith *for the purpose* of meeting the competitor's price, that is, the lower price must actually have been a good faith response to that competing low

price." *Falls City*, 460 U.S. at 439 (emphasis in original). This Court laid out the standard for good faith in the context of the meeting competition defense of § 2(b) of the Robinson-Patman Act in *Falls City*: "At the heart of Section 2(b) is the concept of 'good faith'. This is a flexible and pragmatic, not a technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding *fairly* to what he reasonably believes is a situation of competitive necessity." *Falls City*, 460 U.S. at 441 (quoting *Cont'l Baking Co.*, 63 F.T.C. 2071, 2163 (1963)) (emphasis added). This Court further stated "[w]hether this standard is met depends on 'the facts and circumstances of the particular case, not abstract theories or remote conjectures.'" *Id.* (quoting *U.S. Gypsum*, 438 U.S. at 454).

Accordingly, there are a number of factors that might be relevant to whether a defendant's actions were taken in good faith. *See U.S. Gypsum*, 438 U.S. at 455 ("Given the fact-specific nature of the inquiry, it is difficult to predict all the factors the FTC or a court would consider in appraising a seller's good faith in matching a competing offer in these circumstances."). Presumably, one of those factors is whether the defendant in fact had some ulterior motive in discriminating against one or more of the purchasers of its products. As this Court stated in *Falls City*:

> In *most* situations, a showing of facts giving rise to a reasonable belief that equally low prices were available to the favored purchaser from a competitor will be sufficient to establish that the seller's lower price was offered in good faith to meet that price. *In others, however, despite the availability from other sellers of a low price, it may be apparent that the defendant's low offer was not a good faith response.*

Falls City, 460 U.S. at 439 (emphasis added). CC has argued from long before trial in this matter that its direct evidence of RJR's true intent places this case squarely in the latter of the two categories described by this Court in *Falls City*. The evidence proffered in this case shows that the low price offer to CC's competitors was made for a very different reason than to meet competition (i.e., RJR executives made the offer in attempt to "kill" CC) and the lower prices being given to CC's competitors were not part of a good faith attempt at anything at all.

2. Intent Evidence Is Essential to Rebutting a Claim of Actions Taken in Good Faith Under the "Functional Availability" Defense

Though not explicitly set forth in the statute, this Court has recognized another defense to a claim under Robinson-Patman, also relied upon by RJR, called the "functional availability" defense. *See Morton Salt*, 334 U.S. at 42-43. The functional availability defense is premised upon the idea that a seller is not liable for price discrimination if it made the lower prices or promotional support it is offering to the favored purchaser available to the allegedly disfavored purchaser as well. *Id.*

This affirmative defense also contains an element of good faith. In *Morton Salt*, this Court held a manufacturer liable under the Robinson-Patman Act where it provided one schedule of discounts to all, but placed a quantity requirement on the discounts that precluded most purchasers from the possibility of availing themselves of them. *Id.* at 41-42. In other words, to take advantage of the defense, the seller has to actually intend to sell to the allegedly disfavored purchaser at the lower price or with the same level of promotional support. *Id.* If, in fact, the offers made to the disfavored purchaser were illusory and the discriminating seller had no intention of providing the lower

price or promotional support to the disfavored purchaser, then the defense would fail. *See Hygrade Milk & Cream Co. v. Tropicana Prods., Inc.*, No. 88C2861, 1996 WL 257581, at *7 (S.D.N.Y. May 16, 1996) (unpublished) ("[The defendant], however, may not structure a promotional program in a manner that prevents a customer from participating."). Despite the fact that RJR witnesses testified that they were more than willing, even eager, to deal with CC at the lower price (*see* SA653-54; SA657; SA644-47; SA639; SA619-20), CC was not allowed to present evidence of RJR's actual intent, which would have revealed that the offers RJR made were illusory and that RJR did not intend to make them functionally available to CC.

II. THE SEVENTH CIRCUIT'S DECISION CREATES A SPLIT AMONG THE FEDERAL COURTS OF APPEAL.

If this case had been tried in the Fourth, Eighth, or Eleventh Circuit, the evidence of intent would have been deemed relevant to the inquiries at hand in a Robinson-Patman Act claim.

A. Other Circuits Consider Intent Evidence Relevant in a Secondary-Line Case Under the Robinson-Patman Act.

1. The Fourth Circuit Has Held That Intent Evidence Is Relevant, Particularly to the Good Faith Element of the "Meeting Competition" Defense.

The Fourth Circuit recognizes the relevance of intent evidence in a secondary-line case. *See Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160 (4th Cir. 1999). In *Hoover*, a buyer of synthetic iron oxide pigment brought a Robinson-Patman action claiming it was being charged a higher price than its competitors by the seller of the

pigment. The district court found that the seller "established an affirmative defense by demonstrating that it set its prices in a good faith attempt to meet competition in the marketplace and, therefore, granted the seller summary judgment." *Id.* at 161. The Fourth Circuit reversed, in large part, because the evidence regarding *other* motives the seller had for the price discrimination had been ignored or given no weight by the district court. *See id.* at 167. Proper consideration of the intent evidence, according to the Fourth Circuit, raised an issue of disputed fact that could not be dismissed or disregarded by the court on summary judgment, particularly when such evidence could rebut an assertion of the "meeting competition" defense. *See id.* at 167-68.

In its opinion, the Fourth Circuit looked to this Court's interpretation of the statutory language of the "meeting competition" defense and stated that "to establish the defense, a seller must also prove that 'the lower price . . . *was made* in good faith *to meet*' the competitor's low price." *Id.* at 163 (quoting *Falls City*, 460 U.S. at 439 (emphasis in original)). In applying the teachings of this Court from *Falls City*, the Fourth Circuit first noted that "good faith is at the heart of the [meeting competition] defense" and that "good faith is a flexible and pragmatic, not technical or doctrinaire concept." *Id.* at 163 (quotations and citation omitted). As such, "[r]igid rules and inflexible absolutes are especially inappropriate in dealing with the § 2(b) defense" and "the facts and circumstances of the particular case, not abstract theories . . . should govern its interpretation." *Id.* at 163-64 (quotation omitted). The Fourth Circuit notes that courts have rarely granted a seller judgment as a matter of law "*[b]ecause of this emphasis on intent and good faith* and because the seller has the burden of proving the affirmative defense." *Id.* at 164 (emphasis added). The Fourth Circuit clearly recognized that the "meeting competition" defense hinges upon good faith and that good faith must be

examined in the specific context presented by the circumstances of the case at bar.

After acknowledging the important role that intent evidence plays in establishing good faith, the Fourth Circuit held that the district court erred by ignoring the "significant and direct evidence which, if believed, could rebut Bayer's assertion of the § 2(b) defense." *Id.* at 167. Primary among those pieces of evidence was "evidence related to a possible alternative motive" for the defendant's discriminatory pricing system." *Id.* Evidence of such an ulterior motive is the *exact* type of evidence CC was prevented from providing to the jury in this case. *See* SA5; SA22; SA35, SA674-77. The Fourth Circuit recognized that this type of evidence, which is directly probative of whether a defendant was acting in good faith to "meet competition," presents an issue of credibility not to be resolved by the court, but to be resolved by the jury when assessing whether the defendant has met its burden of proving the affirmative defense. *Id.* at 167-68.

2. The Eleventh Circuit Has Held That Intent Evidence Is Relevant, Particularly to the Good Faith Element of the "Meeting Competition" Defense.

The Eleventh Circuit engaged in a similar analysis and reached the same conclusion regarding the importance of intent evidence in establishing or rebutting the meeting competition defense in *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990). In *Alan's of Atlanta*, also a secondary-line case, the seller invoked the defense in response to a claim that it was discriminating between retailers as to the price of its cameras. *Id.* at 1419-20. The district court granted summary judgment in favor of Minolta because Alan's of Atlanta could not show antitrust injury and, in part, on the basis that Minolta had proven it

was providing lower prices to certain retailers in a good faith effort to meet competition. *Id.* at 1420. Noting that the bases for the district court's decision were "in theory certainly true, [but] in the reality of this case" not true, the Eleventh Circuit reversed and remanded. *Id.* at 1423.

The Eleventh Circuit noted that the plaintiff had hotly disputed the defendant's claims regarding its "good faith" effort to meet the grey market competition, but that the district court had accepted the defendant's "testimony *in toto*" and ignored the plaintiff's disputation (much in the same manner that CC's proffered evidence was deemed irrelevant and inadmissible by the district court in the case at bar). *Id.* at 1424-25. Among the inquiries cited by the Eleventh Circuit as posing *genuine issues of fact*, requiring determination by the jury, were "the good faith nature of the alleged investigation Minolta made into grey market conditions, the propriety of its rather generalized response to the purported competition, and the actual *purpose* which lies behind its price discrimination." *Id.* at 1425 (internal citations omitted) (emphasis in original). In reversing the grant of summary judgment, the Eleventh Circuit noted the defense is "particularly fact-bound," that "the *concept of good faith lies at the core of the defense*," and that "[l]ike the concept of 'good faith' in other legal standards, *the concept here concerns itself with the* belief *of those invoking its protection.*" *Id.* at 1425-26 (additional emphasis added). The Eleventh Circuit concluded this section by noting that "issues of credibility are inherently bound up with a decision on the section 2(b) defense and . . . of course, issues of credibility are beyond a judge's ken." *Id.* at 1426. The Eleventh Circuit, in contrast to the Seventh Circuit, thus held that evidence of the defendant's actual intent or *purpose* in discriminating among retailers is relevant to whether it has established the "meeting competition" defense. *Id.*; *see also McGahee*, 858 F.2d at 1500 ("[C]ommon sense indicate[s] that Congress intended for

subjective evidence of a defendant's intent to be relevant" proof of an antitrust violation.).

3. The Eighth Circuit Has Held That Intent Evidence Is Relevant to Establishing the Likelihood of Injury to Secondary-Line Competition.

The Eighth Circuit has also held, in a secondary-line case, that evidence of a defendant's intent can be used to prove the competitive injury element of the *prima facie* case. *See Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, 711 (8th Cir. 2004), *rev'd on other grounds*, 546 U.S. 164 (2006). Because under the fourth element of the *prima facie* case, a plaintiff is required to show that "the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition," 15 U.S.C. § 13(a), a plaintiff is allowed to introduce "evidence that disfavored competitors lost sales or profits as a result of the discrimination" or the defendant wanted to eliminate certain dealers by reducing those dealers' sales and profits. *Reeder-Simco*, 374 F.3d at 711-12. As the Eighth Circuit recognized in *Reeder-Simco*, one way of implementing a plan to reduce the number of dealers is to cause those types of losses for the disfavored competitors, and "the jury could properly infer Volvo's intent to reduce the number of its dealers manifested itself in the discriminatory concession practices." *Id.* at 712. In addition, the Eighth Circuit noted that the elimination of some dealers, the defendant's admitted intent, was "*precisely the type of injury* the antitrust laws were meant to prevent." *Id.* at 713 (emphasis added). The Eighth Circuit thus plainly recognizes that because the defendant's intention to bring about a certain result is relevant to whether that result (i.e., competitive injury) subsequently occurred or was likely to occur, the evidence of a defendant's true intent is highly probative when determining whether a

secondary-line violation of the Robinson-Patman Act has been established.

B. Among the Courts of Appeal, the Seventh Circuit Stands Alone in Eliminating Evidence of Intent From a Robinson-Patman Claim.

Over twenty-five years ago, the Seventh Circuit expressed its suspicions regarding the usefulness of intent evidence in antitrust litigation. *See A.A. Poultry Farms v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989) (addressing a primary-line competition case). However, the decision in this case marks the first time it has taken such a dramatic leap outside the bounds of this Court's earlier precedent on the subject and set itself so clearly against the law as developed in the other circuits. By ignoring the distinction between primary-line and secondary-line cases – and the applicability of the rationale for relying upon pricing below cost as an indicator of harm to competition in the former but not the latter – and completely eviscerating the good faith element of the statutory defenses to a Robinson-Patman claim, the Seventh Circuit has done what it has previously indicated it would not do in this area of the law: interred cases of this Court that the Seventh Circuit considers "dead, but unburied." *Id.* at 1405.

Judge Easterbrook, writing for the court in *A.A. Poultry*, stated:

> Several other compelling reasons support the conclusion that intent plays no useful role in this kind of litigation. Firms "intend" to do all the business they can, to crush their rivals if they can. "'Intent to harm' without more offers too vague a standard in a world where executives may think no further than 'Let's get more business[.]'" Rivalry is harsh, and consumers gain the most when firms slash

> costs to the bone and pare price down to cost, all in pursuit of more business. Few firms cut price unaware of what they are doing; price reductions are carried out in pursuit of sales, at others' expense. Entrepreneurs who work hardest to cut their prices will do the most damage to their rivals, and they will see good in it. You cannot be a sensible business executive without understanding the link among prices, your firm's success, and other firms' distress.

Id. at 1401-02 (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983)). Specifically, the court expressed its concern that liability would be over-inclusive because juries would not understand the cutthroat nature of the modern marketplace and infer a bad intent from legitimate business actions. *See id.* at 1401-02. The court's concern about juries not being able to understand the evidence and apply the law properly is echoed again by Judge Easterbrook writing for the court in the present case. *See* Pet. App. at 11a ("Even if marginally relevant to some issue (which we doubt), the sort of evidence that Cigarettes Cheaper! wanted to introduce could have played little role beyond confusing jurors who, not being professional economists, may not have understood that markets respond to deeds rather than thoughts or hopes or words.").

In 1989, however, the Seventh Circuit decided it should not blaze its own trail with respect to the antitrust laws. *See A.A. Poultry*, 881 F.2d at 1405 ("Inferior federal courts, in order to provide equal justice under law, must apply the holdings of cases still on the books."). After questioning the wisdom of certain "friend-less" decisions, *see id.* at 1406, and laying out its reasoning against intent evidence, the Seventh Circuit backed away from its rhetoric acknowledging that *Utah Pie* was still the controlling law of

the land. *See id.* at 1405 ("Robinson-Patman cases, for now at least, follow the approach of *Utah Pie.*").

The principles by which the Seventh Circuit was willing to be governed seventeen years ago, and which the Fourth, Eighth, and Eleventh Circuits continue to be governed by, have been abandoned in this case. This time, without any discussion of *Utah Pie* or *Perkins* or *Falls City*, the Seventh Circuit has essentially allowed the district court to take the decision regarding the Robinson-Patman claim from the jury. The Seventh Circuit fails to recognize that while an intent to take business from one's *direct competitors* (and perhaps even "kill" them) may be expected in a primary-line case, the intent to eliminate a discount retailer *of one's own products*, in order to assist a "favored" retailer, is not expected or justified by any of the antitrust laws. In fact, the Robinson-Patman Act is designed specifically to combat such price discrimination; and the fact that a defendant harbored a desire to "kill" one of its retailers through a scheme of price discrimination is directly relevant evidence to whether that retailer can establish its right to relief under Robinson-Patman.

The split in the lower federal courts created by the Seventh Circuit's decision must be addressed. The danger of unequal application of the law concerning the role of intent evidence in claims under the Robinson-Patman Act among the circuits affects the basic rights of both plaintiffs and defendants. The Seventh Circuit should be brought into line with the rest of the federal judiciary on this important issue.

CONCLUSION

The Seventh Circuit at one time was in line with its sister circuits on this issue, but with its holding in this case, the Seventh Circuit is blazing its own trail and redefining

the law of price discrimination to comport with its own view of proper public policy. In its opinion in this case, the Seventh Circuit demonstrates a disturbing lack of faith in a jury's ability to digest, analyze and weigh evidence, especially in situations where determinations of good faith necessarily rely on proof of subjective intent. This Court has repeatedly recognized the relevance of intent evidence in determinations of liability under the Robinson-Patman Act. The Seventh Circuit has re-written the Robinson-Patman Act to fit its own view of the irrelevance of intent evidence in an antitrust case and, in so doing, directly contradicted valid precedential opinions of this Court. Because this places the Seventh Circuit's law in stark contrast to the law of the other federal circuits, the decision of the Seventh Circuit should be reviewed and reversed.

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1456

R.J. REYNOLDS TOBACCO COMPANY AND GMB, INC.,
PLAINTIFFS-APPELLEES,

V.

CIGARETTES CHEAPER!,
DEFENDANT-APPELLANT.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 99 C 1174—Charles P. Kocoras, Judge.

Argued September 12, 2005 — Decided August 24, 2006

Before COFFEY, EASTERBROOK, and EVANS, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* R.J. Reynolds sells cigarettes (Camel, Winston, Salem, and Doral are its principal brands) in both domestic and foreign commerce. For several years Cigarettes Cheaper!, which operates a chain of retail outlets, reimported Reynolds products for domestic sale. (We refer to the practice as "reimportation" even though some of the cigarettes in question were manufactured outside the United States by firms licensed to use the trademarks in their own countries.) That practice led to this litigation, which Reynolds commenced under the

Lanham Act. GMB, one of Reynolds's subsidiaries, owns the marks and is an additional party for that reason. To prevent needless repetition, for the rest of this opinion we treat Reynolds as the sole plaintiff.

Reynolds argued that the sale of gray market products violates the Lanham Act, 15 U.S.C. §§ 1050 to 1127, which protects trademarks used in interstate commerce. Cigarettes Cheaper! replied that the marks are genuine (after all, they were applied by Reynolds or under its license) and took the offensive with two antitrust counterclaims, one based on the Sherman Act and the other on the Robinson-Patman Act. 15 U.S.C. § 13. The Sherman Act theory is that Reynolds conspired with retail dealers, in violation of 15 U.S.C. §§ 1 and 2, to drive it out of business; the Robinson-Patman theory is that Reynolds charged different prices to different retail dealers and in particular refused to sell cigarettes to Cigarettes Cheaper! at its lowest level of discounts (which is, Cigarettes Cheaper! maintains, why it searched abroad for cigarettes to reimport).

The three claims took separate paths. The district court granted summary judgment for Reynolds on the Sherman Act claim after concluding that Reynolds lacks market power. The Robinson-Patman Act claim went to trial, which lasted five weeks. A jury returned a general verdict in favor of Reynolds. Finally the trademark claim was tried to a different jury, after the district judge rejected Cigarettes Cheaper!'s argument that the Lanham Act always permits the use in the United States of trademarks affixed by their proprietor. If the products designed for domestic and foreign markets are materially different, then sale of the reimported product under a mark that consumers associate with the domestic product could be confusing and hence unlawful, the district court ruled. The trial to determine whether the domestic and foreign cigarettes are materially

different lasted two weeks. The jury concluded that they are different and awarded Reynolds approximately $4 million in damages. Having lost on all three claims, Cigarettes Cheaper! has appealed; it complains not only about the principal decisions but also about a large number of evidentiary and other procedural rulings that it says prevented the juries from approaching the issues correctly.

I

As its name implies, Cigarettes Cheaper! is a discounter. That makes it unpopular with other retailers, which don't like competition—but, one would suppose, pleases manufacturers, whose sales increase as the costs of distribution falls. From a manufacturer's perspective, the cost of retail distribution is the difference between the wholesale price it realizes and what the ultimate customer pays. As this cost of distribution drops, the manufacturer sells more units for the same wholesale price, raises the wholesale price to capture the gains, or does a little of each. A manufacturer can gain by increasing the gap between wholesale and resale price only if the retailer supplies services that are worth more than the increase in the cost of distribution. In the cigarette business, retailers furnish at least one important service: advertising. Cigarette manufacturers lack access to television and radio, billboards, many magazines, and some other normal promotional channels. That increases the importance of point-of-sale signs, placards, and other attention-getting devices. And manufacturers are willing to pay for these through selective wholesale discounts. The more a retailer promises to do in promoting a product, the lower the wholesale price.

Manufacturers also reduce wholesale prices in order to match (and sometimes exceed) price reductions by rivals. Reynolds perceives that it must meet or beat the price for Marlboro cigarettes, the market's leading brand. Marlboro, produced by Philip Morris, accounts for about one-third of

all cigarette sales in the United States; all of Reynolds's brands combined, by contrast, account for only 25% of domestic sales. Cigarettes Cheaper! made life difficult for Reynolds and its retailers by charging particularly low prices for Marlboro cigarettes, having negotiated with Philip Morris a contract that afforded it very low wholesale prices in exchange for extensive signage and other promotional services. Reynolds contends that this was an "exclusive" contract that prevented Cigarettes Cheaper! from offering the same level of promotion to any other producer and says that this is why it was unwilling to give Cigarettes Cheaper! its lowest-price-for-highest-promotion package; Cigarettes Cheaper! denies that its deal with Philip Morris deserves the label "exclusive" but allows that it did require especially prominent signs and vigorous promotion of the Marlboro brand and afforded Philip Morris some weeks when other firms' brands could not be promoted.

The district court concluded that Reynolds's 25% share of the cigarette market is too small to create market power. That decision is both questionable and irrelevant. It is questionable as an empirical matter because the record (which on summary judgment must be construed favorably to Cigarettes Cheaper!) does not demonstrate that Reynolds lacks power to make significant price increases without substantial loss in sales. The cigarette market is concentrated (the Herfindahl-Hirschmann Index exceeds 3,000); new entry is difficult if not impossible; customers perceive quality differences among brands (so that a price increase for one brand does not immediately divert customers to rivals); Reynolds's own discounting practices show that it regularly changes price substantially without creating dramatic swings in its sales. See generally William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981); George J. Stigler &

Robert A. Sherwin, *The Extent of the Market*, 28 J.L. & Econ. 555 (1985). The Supreme Court has found market power in circumstances more favorable to the defendant. See *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). What's more, the subject may be irrelevant if, as Cigarettes Cheaper! maintains, Reynolds has engineered (or serves as an agent of) a horizontal conspiracy among retail dealers, for then market power need not be shown. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

This does not lead to a remand for trial, however, for Cigarettes Cheaper! must surmount additional hurdles. It is doubtful that Cigarettes Cheaper! suffers antitrust injury: the discounts to rivals of which it complains are beneficial to consumers. See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Because Reynolds has not argued this point, however (a passing citation to *Atlantic Richfield* is short of focused argument), and it does not affect subject-matter jurisdiction (for Cigarettes Cheaper! suffers injury in fact, even if not the sort of injury that the antitrust laws guard against), we bypass this subject in favor of the topics on which issue has been joined. We ask first whether Cigarettes Cheaper! has a good claim if Reynolds acted unilaterally, and next whether evidence supports Cigarettes Cheaper!'s argument that a horizontal conspiracy was formed.

Reynolds gave other retailers discounts that it denied to Cigarettes Cheaper!. That creates a claim under the Robinson-Patman Act, which we take up in Part II. So far as the Sherman Act is concerned, however, there's nothing wrong with price discrimination. See, e.g., *Schor v. Abbott Laboratories*, No. 05-3344 (7th Cir. July 26, 2006), slip op. 3; *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781 (7th Cir. 1999). The problem is not

discrimination (exemplified by lower prices to favored customers) today, but monopoly and higher prices tomorrow if the pricing scheme knocks firms out of the market and prevents new entry. Antitrust also has a framework for assessing claims that low prices today will produce monopoly tomorrow: predatory pricing.

To make out a predatory-pricing claim, the plaintiff must establish not only that the defendant has sold products below cost but also that exit from the market has occurred or is imminent, enabling the aggressor to recoup by setting monopoly prices that injure consumers. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Yet Cigarettes Cheaper! does not contend that Reynolds sold to any dealer below *any* measure of cost (sparing us the need to determine which is the appropriate measure). Nor does it contend that it has been knocked out of the market or is in imminent danger of leaving. Cf. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). In 2000 Cigarettes Cheaper! signed a retail contract with Reynolds and has been selling legitimate domestic cigarettes ever since, enjoying Reynolds's discounts.

Not that any one firm's departure from retail sales would enable Reynolds or its favored customers to recoup: There are so many cigarette retailers, and entry into retail sales is so easy, that the market approximates economists' vision of perfect competition. To the extent Cigarettes Cheaper! invites us to rule in its favor without insisting that the requirements of a good predatory-pricing claim have been met, we are unwilling to oblige; price cutting is expensive enough to producers without adding antitrust risks. See *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 527-28 (1st Cir. 1989) (Breyer, J.); see also Bruce Kobayashi, *The Economics of Loyalty Discounts and*

Antitrust Law in the United States, 1 Comp. Policy Int. 115 (2005); Herbert Hovenkamp, *The Law of Exclusionary Pricing*, University of Iowa Legal Studies Research Paper 05-34 (Jan. 2006).

Instead of proffering evidence about the likely economic effect of Reynolds's selective discounts, Cigarettes Cheaper! wanted to regale a jury with evidence that its retail rivals (and perhaps Reynolds too) intended to deal it a fatal blow. One memo, for example, discusses ways to "shut down" and "kill" Cigarettes Cheaper! "on the beach" (though presumably without machine guns and tank traps). Cigarettes Cheaper! found plenty of such tidbits in discovery. Cigarettes Cheaper! sold Marlboros for less than many outlets sold Camels and Winstons; neither Reynolds nor its retail outlets were willing to take this lying down. They responded with discounts of their own and generated reams of paper expressing unhappiness about the need to do so.

Yet as we remark frequently in antitrust litigation, "cut-throat competition" is a term of praise rather than condemnation. Joseph Schumpeter called capitalism a "gale of creative destruction." *Capitalism, Socialism and Democracy* 84 (3d ed. 1950). Businesses need not love their rivals (or firms that compete with their customers); consumers gain when firms try to "kill" the competition and take as much business as they can. See, e.g., *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1255-56 (7th Cir. 1995); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1403-04 (7th Cir. 1989); *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989). The question is not whether the defendant has tried to knock out other businesses but whether the means it has employed to that end are likely to benefit or injure consumers. Cigarettes Cheaper! accused Reynolds of using a means—lower

prices—that usually if not always brings benefits to consumers.

Organizing firms into a cartel, however, injures consumers, and Cigarettes Cheaper! maintains that Reynolds has organized the retail dealers in this way. Why it would do any such thing is a mystery. As we've observed already, producers gain when the costs of distribution are lowest; a retail cartel that charged a monopoly price for distribution services would hurt Reynolds as well as (if not more than) ultimate consumers, so it is a surprise to see Reynolds accused of facilitating its own injury. Members of a retail cartel might be able to compensate a producer that organizes and coordinates their group, but there is no sign of compensation: Cigarettes Cheaper! complains about discounts that Reynolds gives to other retailers, not about a hike in the wholesale price that might imply compensation. See *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 932-34 (7th Cir. 2000); cf. *Denny's Marina, Inc. v. Renfro Products, Inc.*, 8 F.3d 1217 (7th Cir. 1993).

Concrete evidence that Reynolds has played the role of cat's paw in a retail conspiracy would suffice even if it was hard to understand the motivation. Nothing to which Cigarettes Cheaper! has pointed in this voluminous record shows, however, that there is an agreement at the retail level. And it is evidence, not allegations, on which the appeal turns. Unlike *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir. 2005), cert. granted, 126 S. Ct. 2965 (2006), in which the district court dismissed a complaint for lack of evidentiary detail about a potential conspiracy, this case proceeded through discovery and was decided on summary judgment; the complaint is no longer relevant.

At oral argument we asked Cigarettes Cheaper!'s counsel to highlight the best evidence for the proposition that Reynolds orchestrated a horizontal agreement. None of the evidence to which our attention was directed would

allow a reasonable jury to infer that there was any horizontal agreement. Take, for example, a document on which Cigarettes Cheaper! harps in its brief. Someone at Vons Groceries prepared a memorandum showing that Vons is worried about losing business to Cigarettes Cheaper! and wants to "keep Cigarettes Cheaper! from their required carton volume" and "defeat [Cigarettes Cheaper!'s] format." The memorandum discusses what Vons sees as weaknesses in Cigarettes Cheaper!'s business model and proposes to exploit those weaknesses to achieve what the author in a flight of fancy calls "a degree of pricing invincibility". The memo continues: "Once results are achieved Vons/Pavilions slowly over time will reduce VonsClub discounts back to normal Vons/Pavilions retail pricing". The document tells us that "RJR will underwrite $3.80 per carton and 20 cents per pack for these brands as long as Vons maintains a $1.00 advantage over Marlboro and a 20 cent advantage over Marlboro packs." In other words, Reynolds reduced its price so that Vons could sell RJR-brand cigarettes for $1.00 a carton (or 20¢ a pack) less than what Vons (not Cigarettes Cheaper!) charged for Marlboro products. Whatever this memo shows about Vons hopes, it does not suggest that there was any horizontal conspiracy. Nothing in the record implies that the memo was seen or acted on by any other retailer. For its part, Reynolds had every right, under antitrust law, to condition discounts on agreement by its customers to reduce the prices they charged to consumers. See *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

Another of Cigarettes Cheaper!'s featured documents is a memorandum that one of Reynolds's employees wrote about the firm's dealings with Albertson's, another retailer. Counsel highlighted this language:

> We have established a program to offer buydown [= discount] support in Albertson's stores in direct competition with Cheaper Stores. . . . Albertson's

> stores are matching Cheapers prices on all brands except Camel and Winston where we have a $.50 per carton advantage on Marlboro. . . . [In some stores] Marlboro [has] a price advantage on us. We met with Albertson's about this matter this week .... As information, Albertson's is very pleased with their overall cigarettē sales.

Emphasis omitted. That a retailer is "pleased" with its ability to sell more after receiving a price reduction is obvious and does not imply any agreement to raise prices in the future. One of Albertson's executives testified at a deposition that in one market prices fell when Cigarettes Cheaper! entered and returned to prior levels when its store closed; once again this morsel would not permit a reasonable jury to find that there was a retail conspiracy (or any probability of recouping losses sustained during a discounting campaign, for a return of price to a pre-discounting competitive level differs from elevation of price to a cartel level).

We could traipse through other documents from the record, but there is no need. These documents are Cigarettes Cheaper!'s best evidence; nothing else we have seen is any more favorable. The district court properly granted summary judgment against Cigarettes Cheaper!'s claim under the Sherman Act.

II

Reynolds sold to other retailers for less than it sold to Cigarettes Cheaper!; this threw on Reynolds the burden to establish a justification. 15 U.S.C. §13(b). Reynolds offered several: it maintained, for example, that the lower prices were as available to Cigarettes Cheaper! as to any other retailer (all it had to do was stop selling gray market cigarettes and provide Reynolds with in-store placards and other support equal to what Cigarettes Cheaper! gave to Philip Morris products) and that the discounts to other

retailers were necessary to meet competition from Philip Morris, Lorillard, Liggett, and a handful of smaller producers. The jury was persuaded by these defenses.

According to Cigarettes Cheaper! the five-week trial, long as it was, actually was far too abbreviated. Cigarettes Cheaper! wanted to introduce the "intent" evidence that we have discussed briefly. The district judge excluded it. The Robinson-Patman Act prohibits certain price differences; a bad intent is not part of the plaintiff's *prima facie* case under § 13(a), and a "good" intent (apart from its bearing on the statutory justifications) does not excuse price discrimination. Even if marginally relevant to some issue (which we doubt), the sort of evidence that Cigarettes Cheaper! wanted to introduce could have played little role beyond confusing jurors who, not being professional economists, may not have understood that markets respond to deeds rather than thoughts or hopes or words. Keeping this evidence out enabled the court to focus jurors' attention on the statutory requirements and defenses. The district judge sensibly relied on Fed. R. Evid. 403, which authorizes the exclusion of evidence whose tendency to create prejudice substantially outweighs any benefit; this was not an abuse of discretion.

Trying another tack, Cigarettes Cheaper! proposed to use this evidence to impeach Reynolds's witnesses, some of whom testified (as part of Reynolds's theory that the discounts were available to any outlet) that Reynolds would have been happy to cooperate with Cigarettes Cheaper!, the better to sell more cigarettes. This led to the response that Reynolds wanted to "kill" rather than "help" Cigarettes Cheaper!. The district judge should have kept *all* claims about motive or intent out of evidence; whether Reynolds was "trying to help" Cigarettes Cheaper! or just engaging in grudging compliance with its legal obligations is neither here nor there. The instructions did not call on the jury to

resolve any dispute about the intent with which Reynolds acted. This means that any error in not allowing impeachment on the subject of intent was harmless.

There is one dispute about instructions. The judge told the jury:

> The law does not require RJR to meet competition on a customer-by-customer basis. Rather, RJR can meet competition on a broader basis so long as its action was a genuine, reasonable response to prevailing competitive circumstances in the marketplace. That is, RJR must simply show that its offer of lower prices or greater allowances was reasonably tailored to the competitive situation that it realistically faced in the marketplace.

According to Cigarettes Cheaper!, this statement is erroneous because, if all the defendant must do is show that the market is generally competitive, then the Robinson-Patman Act might as well be repealed. That's why the statute "places emphasis on individual competitive situations, rather than upon a general system of competition." *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945); see also, *e.g.*, *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69 (1979); *Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160, 165 (4th Cir. 1999).

Although this instruction could have been misunderstood to embody the mistake that Cigarettes Cheaper! highlights, that would not have been a plausible reading. Another instruction told the jury that to prevail on a meeting-competition defense Reynolds had to establish that the prices it was meeting were available to customers from another source. It would not be sound to read the challenged instruction as taking back that limitation.

Reynolds did not argue "this market is rivalrous" and stop. Instead it maintained that discounts on Winstons and other brands were generally available to retailers because

Philip Morris made *its* discounts generally available. If producer A makes a generally available offer, then a generally available response meets the competition. The Robinson-Patman Act favors general price schedules, see *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 450-51 (1983), and the district judge did not err in providing the jury with this information in a concise instruction. Cigarettes Cheaper! would have a sounder point if it had proposed language to distinguish "general competition" from "generally available price schedules," but it did not do so and cannot blame the judge for failing to come up with language unaided.

III

At last we arrive where the case began: the trademark claim. Apart from formalities, it is easy to see why Reynolds cares about the reimportation of cigarettes initially sold abroad. Cigarettes Cheaper! perceives the lower price of foreign cigarettes as yet another form of price discrimination, but from Reynolds's perspective the price difference reflects a cost difference. Tort litigation and the tobacco settlement between the states and the cigarette industry impose a substantial cost (equivalent to an excise tax) on every pack of cigarettes sold in the United States. Reynolds must charge more for domestic product to cover this cost; to sell domestic and foreign product at the same price would be a form of economic price discrimination and would cripple Reynolds in competition with foreign producers that do not bear the extra costs of selling tobacco in the United States. Reimporting cigarettes originally sold abroad exposes Reynolds to the U.S. litigation tax without compensation. It turned to the Lanham Act to find a means to keep domestic and foreign markets separate.

The Lanham Act does not block the reimportation and sale of genuine articles under their real trademarks. See *NEC Electronics v. CAL Circuit Abco*, 810 F.2d 1506 (9th

Cir. 1987). But this principle does not apply if the domestic and foreign products are materially different, for then sale of the foreign product in the United States under the domestic marks has a potential to mislead or confuse consumers about the nature or quality of the product they are buying; they will assume it to be the same as the normal domestic product and be disappointed. See *Lever Brothers Co. v. United States*, 877 F.2d 101 (D.C. Cir. 1989), 981 F.2d 1330 (D.C. Cir. 1993); *Société Des Produits Nestlé, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 641 (1st Cir. 1992). Reynolds's principal argument therefore has been that the cigarettes it sells abroad are materially different from those it sells in the United States under the same brands.

Reynolds initially maintained that the distinguishing factors included differences in the cigarettes' additives and taste. That led Cigarettes Cheaper! to demand detailed disclosures about what, exactly, is in Reynolds's cigarettes here and abroad. Rather than reveal documents that it believes to be trade secrets, Reynolds withdrew this contention—except with regard to Winston, for, in the United States, Reynolds sells that brand under a representation that it contains nothing other than tobacco and water. The district court issued a protective order foreclosing discovery about additives except with respect to Winstons, and then only on the question whether it contains any additive at all. At trial the district court excluded the sort of evidence that had been placed outside the scope of discovery. Reynolds then argued that the existence of some additives made foreign-market Winstons materially different from the domestic product and that all of the brands differed with respect to loyalty programs (domestic Camels packages, for example, include coupons called "C-Notes" that can be collected and redeemed for merchandise) and post-manufacturing quality control (domestic cigarettes

are inspected and removed from sale at the end of their shelf life; reimported gray market products are not).

Although Cigarettes Cheaper! allows that the evidence permitted the jury to find material differences with respect to all of the brands, it maintains that the verdict is suspect because the jury may have assumed that there were unstated differences in additives and taste. To avoid such a possibility, Cigarettes Cheaper! contends, it should have been allowed to conduct discovery and introduce evidence about the products' additives. That proposes a graymail tactic in defense of gray market sales. Additives were not relevant to the trial (except with respect to Winstons); "taste" was not relevant to any of the trademarks. The jury was told to confine its attention to the arguments that were made at trial.

The only function of the argument that Cigarettes Cheaper! makes now would have been either to force Reynolds to reveal trade secrets as the price of enforcing its trademarks, or to forego protection of the Lanham Act in order to retain its trade secrets. The district judge did not abuse his discretion in deflecting that tactic. Reynolds had to pay a price to keep its secrets: it abandoned any contention that additives and taste differentiated domestic and foreign products; having prevailed (by default) on those issues, Cigarettes Cheaper! was not entitled to any other relief. (Cigarettes Cheaper! does insist that "taste" should have been relevant to Winstons, but that's wrong; given the marketing of domestic Winstons as additive-free, the existence of additives in product initially sold abroad was material whether or not consumers could smell the difference. The palette is hardly the only part of the body affected by the contents of cigarette smoke.)

It seems that we cannot escape arguments about intent. Cigarettes Cheaper! maintains that in order to reduce the damages it should have been allowed to introduce evidence

that it acted in "good faith" when selling the gray market cigarettes—and one aspect of this "good faith," according to Cigarettes Cheaper!, is that "internal RJR documents show[ ] that RJR thought" the sale of reimported cigarettes to be lawful. This illustrates one of the problems potentially caused by comprehensive discovery. A large firm such as Reynolds, with thousands of employees, generates mountains of internal paper. Some of the employees are bound to take almost any view about almost every subject. Yet only the CEO and Board of Directors speak for Reynolds; that one or more subordinates reached one or another conclusion does not demonstrate that "RJR thought" anything in particular, let alone that it was reasonable for Cigarettes Cheaper! to have thought the same thing (if indeed it did). The district judge sensibly prevented an excursion through Reynolds's files, which would have hijacked this trial.

Indeed, the judge properly excluded most of the "intent" evidence that Cigarettes Cheaper! proposed to offer—though the judge allowed some, Fed. R. Evid. 403 permitted him to set limits to avoid waste of time. Mental states are no defense to *actual* damages, which is all the jury awarded. (There was a separate "wilful dilution" finding, but it turned out not to affect damages.) If Cigarettes Cheaper! had wanted to make a serious stand on the issue of good faith or reasonable mistake, it should have allowed the jury to learn the advice its lawyers furnished about the propriety of selling reimported cigarettes bearing domestic trademarks. When Reynolds sought to learn what legal advice Cigarettes Cheaper! had received, however, it was met with an invocation of the attorney-client privilege. Cigarettes Cheaper! had every right to take that position, but having done so it could hardly insist that other, potentially unreliable, indicators of its executives' thinking be paraded before the jury.

The tail end of Cigarettes Cheaper!'s brief complains about no fewer than five of the instructions given to the jury. The arguments are undeveloped (not a single case is cited, and the brief does not explain why the district judge ruled as he did) and forfeited.

AFFIRMED

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

SEPTEMBER 15, 2006

Before
Hon. JOHN L. COFFEY, Circuit Judge
Hon . FRANK H. EASTERBROOK, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

No. 05-1456

R.J. REYNOLDS TOBACCO COMPANY AND GMB, INC.,
PLAINTIFFS-APPELLEES,

v.

CIGARETTES CHEAPER!,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 99 C 1174
Charles P. Kocoras, Judge.

ORDER

Defendant-appellant filed a petition for rehearing on September 7, 2006. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

15 U.S.C. § 13

§ 13. Discrimination in price, services, or facilities

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling

goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Burden of rebutting prima-facie case of discrimination

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) Payment or acceptance of commission, brokerage, or other compensation

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or

to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Payment for services or facilities for processing or sale

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) Knowingly inducing or receiving discriminatory price

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

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No. 06-848

IN THE

Supreme Court of the United States

CIGARETTES CHEAPER!,

Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY AND GMB, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in excluding certain evidence pursuant to Federal Rule of Evidence 403?

CORPORATE DISCLOSURE STATEMENT

Reynolds American Inc., R.J. Reynolds Tobacco Holdings, Inc., and FHS LLC are the parent companies of respondents, and Reynolds American Inc. is a publicly traded company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATUTE AND RULE OF EVIDENCE INVOLVED 1

STATEMENT 1

A. Factual Background 1

B. Procedural Background 4

REASONS FOR DENYING THE PETITION 9

I. THE SEVENTH CIRCUIT DID NOT "REWRITE" THE ROBINSON-PATMAN ACT; IT AFFIRMED THE DISTRICT COURT'S APPLICATION OF FEDERAL RULE OF EVIDENCE 403 10

II. THE "ILL INTENT" EVIDENCE WAS NOT RELEVANT IN THIS CASE; THERE IS NO SPLIT 13

A. Competitive Injury Element 14

B. Meeting Competition Defense 18

C. Functional Availability 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases **Page**

Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414 (11th Cir. 1990) 21, 22
Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 23
Barr Labs., Inc. v. Abbott Labs., 978 F.2d 98 (3d Cir. 1992) 17, 21
Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 16, 17
Bus. Elecs. Co. v. Sharp Elecs. Co., 485 U.S. 717 (1988) 16
FTC v. A.E. Staley Mfg. Co., 324 U.S. 746 (1978) 22
FTC v. Morton Salt Co., 334 U.S. 37 (1948) 15, 24
Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983) ..... *passim*
Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979) 19
Henry v. Chloride, Inc., 809 F.2d 1334 (8th Cir. 1987) 17
Hoover Color Corp. v. Bayer Corp., 199 F.3d 160 (4th Cir. 1999) 14, 20, 21, 25
Hygrade Milk & Cream Co. v. Tropicana Prods., Inc., No. 88 Civ. 2861 (SAS), 1996 WL 257581 (S.D.N.Y. May 16, 1996) 24-25
Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320 (5th Cir. 1998) 24
Perkins v. Standard Oil Co., 395 U.S. 642 (1969) 17, 18
R.B. Matthews, Inc. v. Transamerica Transp. Servs., Inc., 945 F.2d 269 (9th Cir. 1991) 11-12
Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp, 374 F.3d 701 (8th Cir. 2004) 18
Shreve Equip., Inc. v. Clay Equip. Corp., 650 F.2d 101 (6th Cir. 1981) 5, 24

TABLE OF AUTHORITIES
(Continued)

Page

Standard Oil Co. v. FTC, 340 U.S. 231 (1951) 20, 23
Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29 (1944) 21
United States v. Abel, 469 U.S. 45 (1984) 11
United States v. U.S. Gypsum Co., 438 U.S. 422 (1978) 19
Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967) 16-17
Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 126 S. Ct. 860 (2006) 14, 15, 16, 18

Statutes & Rules

15 U.S.C. § 1 4
15 U.S.C. § 2 4
Robinson-Patman Act, 15 U.S.C. § 13 ..... *passim*
28 U.S.C. § 1254(1) 1
FED. R. EVID. 403 ..... *passim*

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND RULE OF EVIDENCE INVOLVED

In addition to the Robinson-Patman Act, Federal Rule of Evidence 403 is also relevant. That rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

STATEMENT

Petitioner Cigarettes Cheaper! ("CC") filed a Robinson-Patman Act counterclaim against respondent R.J. Reynolds Tobacco Company and its subsidiary GMB, Inc. (collectively "RJR") for alleged price discrimination. After a five-week trial, a jury entered judgment in favor of RJR. CC's petition for certiorari concerns evidentiary rulings made during the course of that trial.

A. Factual Background

RJR sells Camel, Winston, Salem, and Doral cigarettes. Pet. App. 1a.[1] It competes with several other cigarette manufacturers, including Philip Morris, Lorillard, and Liggett. R.351 ¶ 14; RA539-40; RA1094; R.352 Exs. 3-8; R.370 ¶ 33 Resp. Because they may not advertise on television, radio, or billboards, cigarette manufacturers rely on retailers to promote their brands through product placement and point-of-sale signs and placards. Pet. App. 3a; R.351 ¶ 27; RA387-88. Competition for such retail "presence" is vigorous. RA396-97; RA410; RA420;

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[1] "Pet." refers to CC's petition for certiorari; "Pet. App." refers to the appendix thereto; "R." refers to the Record; "RA" refers to RJR's appendix in the Court of Appeals; and "CCBr." refers to CC's opening brief in the Court of Appeals.

R.371 Ex. 136 ¶¶ 3-8. There are hundreds of thousands of cigarette retailers nationwide (*e.g.*, grocery stores, gas stations, convenience stores), and cigarette manufacturers offer them myriad incentives, including direct payments, to provide things like better shelf placement and permanent advertising. RA296-97; RA409-10; RA415; RA420; RA541-47; R.371 Ex. 136; R.351 ¶ 29. Cigarette manufacturers also periodically offer discounts and promotions that retailers must pass along to customers. A typical discount is a "buydown" (*e.g.*, offering dollars off cartons and cents off packs); a typical promotion is a "buy-some-get-some-free" (*e.g.*, offering a free pack with the purchase of two packs). R.351 ¶¶ 29-32; RA392; RA541-42. These various discount and promotion programs "directly affect[] the retail prices at which cigarettes are sold." CCBr. 32.

During the relevant time period, Philip Morris was the largest cigarette manufacturer in the United States—its Marlboro brand alone had a larger market share (33 percent) than all of RJR's brands combined (25 percent). Pet. App. 3a-4a; R.351 ¶¶ 13-16; RA538-40; RA1094. In the mid-1990s, Philip Morris secured numerous contracts under which the retailer would agree to maximize the retail "presence" of Philip Morris products and, correspondingly, curtail the retail "presence" of competing cigarette manufacturers in return for higher discounts and other promotional payments from Philip Morris. R.371 Ex. 136 ¶ 5; RA1100; RA296-97; RA417-19; RA421-23; RA438; RA564-67. The most restrictive of those agreements was the "Philip Morris exclusive," in which the retailer guaranteed Philip Morris the most and best shelf space; the sole right to place permanent signage and displays; and the exclusive right to offer discounts and promotions during specified weeks each quarter. RA1057-65; RA419; RA422-23; RA372-73; R.351 ¶ 36.

RJR responded to this advertising and price competition from Philip Morris by offering retailers new contractual

options, with greater incentives offered for greater retail "presence." R.351 ¶ 34; RA415-16; RA408; RA224-25. RJR generally required retailers receiving its promotional resources to allow RJR brands permanent (though, unlike Philip Morris, not exclusive) signage and to permit RJR to offer discounts and promotions whenever RJR deemed it competitively necessary. R.351 ¶ 33; RA414; RA420; RA446; RA449-50. Through these contracts, RJR also endeavored to meet, on a retailer-by-retailer basis, some of the discounts and promotions offered under the "Philip Morris exclusive" contracts. RA434-37; RA428-29; RA451; RA568-71; RA574-81; RA1501-12; RA582-83. In order to gauge Philip Morris's actual pricing discounts and to facilitate its market responses to those discounts, RJR identified the retailers that signed "Philip Morris exclusive" contracts, tracked the terms of those agreements, and gathered a wealth of information from the cigarette trade concerning the volume and timing of Philip Morris's promotional activities. RA401-A-403; RA1244; RA447; RA559-61; RA1513-27; RA435; RA398-99; RA401-08; RA574-80; RA549-50; RA300-07; RA1528-38; RA405-06.

One of the "Philip Morris exclusive" retailers leading the price competition was CC, which entered the cigarette retail market in 1994 and aspired to open 5,000 cigarette outlets by 2000. RA1209-10; R.370 ¶ 5 Resp. CC was one of the earliest retailers to sign the "Philip Morris exclusive" contract, and, from the outset, each of its stores received Philip Morris's highest level of promotional resources. RA1177-78; R.351 ¶¶ 35-36; RA1145; RA1147; RA1148; RA205-06; RA209-10; RA1175; RA1182; RA1209; RA1211-12; RA211-19. In return for lower prices on Philip Morris cigarettes, CC agreed to give Philip Morris the exclusive right to permanent advertising and three weeks each quarter in which only Philip Morris could offer discounts and promotions. R.351 ¶ 36; RA1057-92; RA278-79; RA372-73. Because CC physically relegated competing cigarette brands to the lowest shelves and prominently

displayed Philip Morris cigarettes and advertisements, its stores looked like "Marlboro factory outlets." RA1553; RA1175, RA1209-10; RA217-18; RA1066-92; RA256-71; RA308-09; RA452-54; RA377; RA463-64. CC touted its close affiliation with Philip Morris and its top-selling Marlboro brand in a 1996 prospectus. RA1152-1216.

Between 1994 and 2000, RJR offered to enter into discount and promotion agreements with CC on many occasions. RA1248-65; RA285-88; RA1266-67; RA291-92; RA1268-83; RA280-82; RA309-12; RA1286-1304; RA313-31; RA455-58; RA1284; RA1309-11; RA465-78; RA1313-21; RA231-33; RA1322-37; RA336-39; RA479-93; RA342-51; RA1338; RA283-84; RA1340-62. CC rejected each of RJR's proposals (RA1305-08; RA331-32; RA458; RA461-62; RA470-71; RA476-78; RA336-39; RA342; RA350-51), even after RJR offered to relax certain of its retail "presence" requirements (RA1287-1304; RA1313-31; RA455-58; RA1284). A sticking point was RJR's standard requirement that it receive permanent advertising in return for its promotional resources. RA470-71; RA476-78. As CC's founder wrote, CC could not—consistent with its obligations under the "Philip Morris exclusive" contracts—give RJR permanent signage. RA1366; RA229-30. It was not until March 2000 that CC and RJR finally agreed upon a merchandising arrangement. RA1373-84; RA354-55.

B. Procedural Background

This litigation began in 1999 when RJR filed a Lanham Act suit against CC for trademark infringement, relating to the sale of "gray market" cigarettes. Pet. App. 2a. After a two-week trial on that Lanham Act claim, a jury awarded RJR approximately $4 million in damages. *Id.* at 2a-3a.

CC filed two antitrust counterclaims in RJR's Lanham Act suit: a Sherman Act claim alleging that RJR had joined a conspiracy with CC's retailer competitors to put CC out of business, 15 U.S.C. §§ 1 and 2, and a Robinson-Patman Act claim alleging that RJR engaged in illegal price

discrimination by selling cigarettes to certain retailers at lower prices, *id.* § 13. The district court entered summary judgment in favor of RJR on CC's Sherman Act claim.

Both the Lanham Act verdict and the Sherman Act summary judgment grant were affirmed by the United States Court of Appeals for the Seventh Circuit and are not challenged in this Court. Pet. App. 3a-10a, 13a-17a.

The Robinson-Patman Act counterclaim went to trial and, after hearing evidence and argument for over a month, a jury rejected CC's counterclaim and entered a general verdict in favor of RJR. Pet. App. 2a; R.625. At trial, CC met its initial burden of showing that RJR sold its cigarettes to other retailers for lower prices. Pet. App. 10a. RJR responded with evidence (discussed p. 4 *supra*) showing that it had offered CC merchandising contracts similar to those that it had offered other retailers, and argued that there could be no claim of discrimination since the lower prices were "functionally available" to CC. *See Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105 (6th Cir. 1981) ("Where a purchaser does not take advantage of a lower price or a discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or the discrimination is not the proximate cause of the injury.") (collecting cases). In addition, RJR presented evidence (discussed pp. 2-3 *supra*) in support of its affirmative "meeting competition" defense, showing that it had offered certain retailers lower prices in order to meet competition from Philip Morris and its "exclusive" retailers, like CC. *See* 15 U.S.C. § 13(b) (seller may rebut *prima facie* case "by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor").

CC sought to introduce at trial certain "ill intent" evidence to show that RJR harbored a subjective intent to put CC out

of business. *See* Pet. 3-5.[2] Almost all of this "ill intent" evidence came from a one-year period (1996), and it indicated in colorful and intemperate language (*e.g.*, "kill on the beach") the reaction of certain RJR employees to the price competition that CC had generated with its "Philip Morris exclusive" contracts. CC itself explained the reason for this competitive animus in its Seventh Circuit brief:

> CC's rapid expansion in 1995 and 1996 and low prices on Philip Morris's Marlboro and other brands threatened RJR's already-deteriorating market position. RJR was worried CC might expand to capture 20% of the U.S. cigarette m[ar]ket, selling vast quantities of low-priced Marlboros. Cheap Marlboros would force RJR to follow and drop prices on its brands, decreasing RJR's profits. . . . RJR feared that consumers, lured by Marlboro's premium image, would switch from RJR savings brand to Marlboro.

CCBr. 9-10 (record citations omitted). The Seventh Circuit similarly understood the basis for the "ill intent" evidence: "[CC] sold Marlboros for less than many outlets sold Camels and Winstons; neither [RJR] nor its retail outlets were willing to take this lying down. They responded with discounts of their own and generated reams of paper expressing unhappiness about the need to do so." Pet. App. 7a.

After *in limine* briefing and argument, the district court excluded the "ill intent" evidence from CC's case-in-chief, reasoning that the Sherman Act conspiracy claim for which

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[2] CC did not originally offer this "ill intent" evidence in support of its Robinson-Act price discrimination claim, but instead in support of its Sherman Act conspiracy claim. R.404 pp. 3-4. Only after the district court granted summary judgment to RJR on that Sherman Act claim did CC argue that this "ill intent" evidence was also relevant to its Robinson-Patman Act claim. RA3-4.

that evidence was originally offered had been dismissed and that CC did not need the evidence to establish its *prima facie* case under the Robinson-Patman Act. RA3-15. The district court noted that the "ill intent" evidence might not be admissible under Federal Rule of Evidence 403 (RA15), but deferred deciding that issue until both parties had presented their evidence, at which time the facts and theories of the case would be clearer (RA3; RA21-22). When CC renewed its motion to admit the "ill intent" evidence at the rebuttal stage, the district court determined that "[t]he prejudice of such evidence is apparent and substantial; and, in my view, far exceeds any probative value." RA587. Recounting that each side had been able "to present its position, in terms of what was done, what was said, what was offered and what was not offered," the district court held:

> There is a voluminous evidentiary record in this case with respect to the statements of the parties, promotions, discounts and other benefits which were offered or not offered to [CC], and those offered or not offered to other retailers who can arguably be viewed as competitors of [CC]. . . . These matters are the essence of the Robinson-Patman issues involved in this case. . . . Consequently, conspiracy-type evidence and other similar ill-will evidence would add little, if any, probative value to the existing evidentiary record. That stands in stark contrast to the prejudicial effect of such evidence.
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> * * *
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> There is a substantial risk . . . that because of the potential inflammatory nature of some of this evidence, particularly—and I will give you an example: "Kill them on beach"—that is an expression that is incendiary. Quite frankly, that expression can be used with respect to lawful conduct on the part of a party and it could be expressive of unlawful conduct. For the jury to hear . . . an expression of a thought process,

> uncoupled with some later conduct . . . would, I think, exalt the importance of that—would channel the jury's attention to issues not particularly relevant, . . . and get them off on a wild good chase and possibly decide this case for the wrong reasons.
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> * * *
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> That is a substantial [Rule] 403 violation and I am convinced of that more than ever.

RA586-89. The district court similarly "excluded ill-will-type evidence sought to be admitted by [RJR] against [CC]," barring RJR under Rule 403 from introducing diary entries of one of CC's officers that showed that CC had no intent to reach a merchandising agreement with RJR. RA587. Despite their relevance to the functional availability issue, the district court excluded the diary entries because they contained some "highly insulting" remarks and very negative characterizations of RJR personnel. RA22-23.

On appeal, the Seventh Circuit held that the district court's rulings on CC's proffered "ill intent" evidence were not an abuse of discretion. Pet. App. 11a-12a. In full, the Court of Appeals reasoned:

> [CC] wanted to introduce the "intent" evidence that we have discussed briefly. The district judge excluded it. The Robinson-Patman Act prohibits certain price differences; a bad intent is not part of the plaintiff's *prima facie* case under § 13(a), and a "good" intent (apart from its bearing on the statutory justifications) does not excuse price discrimination. Even if marginally relevant to some issue (which we doubt), the sort of evidence that [CC] wanted to introduce could have played little role beyond confusing jurors who, not being professional economists, may not have understood that markets respond to deeds rather than thoughts or hopes or words. Keeping this evidence out enabled the court to focus jurors' attention on the statutory requirements and defenses. The district judge

> sensibly relied on Fed. R. Evid. 403, which authorizes the exclusion of evidence whose tendency to create prejudice substantially outweighs any benefit; this was not an abuse of discretion.
>
> Taking another tack, [CC] proposed to use this evidence to impeach [RJR]'s witnesses, some of whom testified (as part of [RJR]'s theory that discounts were available to any outlet) that [RJR] would have been happy to cooperate with [CC], the better to sell more cigarettes. This led to the response that [RJR] wanted to "kill" rather than "help" [CC]. The district court should have kept *all* claims about motive or intent out of evidence; whether [RJR] was "trying to help" [CC] or just engaging in grudging compliance with its legal obligations is neither here nor there. The instructions did not call on the jury to resolve any dispute about the intent with which [RJR] acted. This means that any error in not allowing impeachment on the subject of intent was harmless.

Id.

REASONS FOR DENYING THE PETITION

The central premise of CC's petition for certiorari is demonstrably false. Despite CC's hyperbolic claims to the contrary, the Seventh Circuit has not ruled that "intent" evidence is *per se* irrelevant in Robinson-Patman Act cases, or even that such evidence was irrelevant in this particular case. Rather, the Seventh Circuit simply stated that it "doubted" that evidence about RJR's intent was relevant to any issue here. It did not, however, elaborate or come to closure on this point because it held that the district court had not abused its discretion in excluding the "ill intent" evidence proffered by CC pursuant to Federal Rule of Evidence 403. The factbound application of Rule 403 in this case creates no split of authority and obviously does not warrant this Court's review.

Even assuming *arguendo* that the Seventh Circuit held that the "ill intent" evidence here was irrelevant, that holding was surely correct, creates no split of authority, and does not warrant this Court's review. The Court of Appeals found that CC had *established* a *prima facie* case under the Act by showing an ongoing price differential. Any "intent" evidence to *bolster* this already-established *prima facie* showing was necessarily superfluous and its exclusion inherently could not *harm* CC, since it successfully made its *prima facie* case without such evidence. Nor was the "ill intent" evidence relevant to RJR's affirmative defense of "meeting competition." As the evidence before the jury showed and as CC concedes, Philip Morris was offering discounts through retailers like CC to which RJR responded with similar discounts. Having thus established the meeting competition defense, RJR could not have lost it simply because some of RJR's employees expressed competitive animus against those (Philip Morris and CC) that forced RJR to lower its prices. Finally, the subjective intent of certain RJR employees towards CC is plainly irrelevant to the objective question whether RJR's lower prices were, in fact, offered to, and therefore "functionally available" to, CC.

I. THE SEVENTH CIRCUIT DID NOT "REWRITE" THE ROBINSON-PATMAN ACT; IT AFFIRMED THE DISTRICT COURT'S APPLICATION OF FEDERAL RULE OF EVIDENCE 403

In strident tones, CC claims that the Court of Appeals has taken "a dramatic leap outside the bounds of this Court's earlier precedent" and has set itself "clearly against the law as developed in the other circuits." Pet. 25. According to CC, the Seventh Circuit "has re-written the Robinson-Patman Act," *id.* at 27-28, by holding "that intent evidence is irrelevant in *all* types of Robinson-Patman Act claims," *id.* at 8 (emphasis in original). But the entirety of CC's petition for certiorari is premised upon a fundamental mischaracterization of the Seventh Circuit's opinion.

The Seventh Circuit plainly did not hold that intent is always irrelevant under the Act. Rather, the Seventh Circuit only expressed its "doubt" whether RJR's subjective intent was relevant: "Even if marginally relevant to some issue (which we doubt), the sort of [intent] evidence that [CC] wanted to introduce could have played little role beyond confusing jurors who, not being professional economists, may not have understood that markets respond to deeds rather than thoughts or hopes or words." Pet. App. 11a. The Court did not resolve the question whether the "ill intent" evidence was irrelevant. Rather, it found that the district court did not "abuse [its] discretion" in excluding this evidence under "Fed. R. Evid. 403" since the trial court "sensibly" concluded that its "tendency to create prejudice substantially outweighs any benefit." *Id.*

The Seventh Circuit, in other words, had no cause in this case to resolve conclusively whether a defendant's subjective intent is relevant to establishing or rebutting a *prima facie* case under the Robinson-Patman Act because it determined that the district court had properly excluded CC's proffered "ill intent" evidence under Federal Rule of Evidence 403. It merely held that, even if subjective intent evidence is marginally relevant under the Robinson-Patman Act, it is subject to the strictures of Rule 403.

CC does not and cannot maintain that subjective intent evidence *must* be admitted in a Robinson-Patman Act trial regardless of its probative value, its inflammatory nature, or its potential to confuse the issues. That is fatal to its petition. It is settled law that "[a] district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules," and that its application of Rule 403's balancing test is reviewed only for "abuse[] [of] discretion." *United States v. Abel*, 469 U.S. 45, 53-54 (1984). The deference accorded the trial judge reflects the fact that "the considerations arising under Rule 403 are susceptible only to case-by-case determinations, requiring examination of the surrounding facts, circumstances, and issues." *R.B.*

Matthews, Inc. v. Transamerica Transp. Servs., Inc., 945 F.2d 269, 272 (9th Cir. 1991) (internal quotation marks and citation omitted).

The district court considered the "ill intent" evidence at issue here both at the outset of trial and again at the rebuttal stage, at which point it was intimately familiar with the evidence supporting CC's counterclaim and RJR's affirmative defense. It determined that each side had been able "to present its position, in terms of what was done, what was said, what was offered and what was not offered" (RA588); that the "conspiracy-type evidence and other similar ill-will evidence would add little, if any, probative value to the existing evidentiary record" (RA586-87); and that the "inflammatory" and "incendiary" nature of the proffered evidence might cause the jury to "decide this case for the wrong reasons" (RA588). The Seventh Circuit agreed with that cogent analysis, concluding that the district court "sensibly" invoked Rule 403 to exclude CC's proffered "ill intent" evidence so that the jurors would "focus . . . on the statutory requirements and defenses" under the Robinson-Patman Act. Pet. App. 11a.

In an apparent effort to confuse this point, CC focuses (Pet. 6) on the sentence in the Seventh Circuit's opinion stating that "a bad intent is not part of the plaintiff's *prima facie* case under § 13(a) [of the Act], and a 'good' intent (apart from its bearing on the statutory justifications) does not excuse price discrimination." Pet. App. 11a. This sentence does not, in isolation or (especially) in context, suggest that intent is *per se* irrelevant in Robinson-Patman cases. The statement that intent is "not part of" the plaintiff's *prima facie* case is plainly correct and *reduces* plaintiff's burden by clarifying that it need not show such intent to establish a presumptive violation. Indeed, CC benefited from this ruling because it was found to have established a *prima facie* case here without such evidence. Similarly, the opinion's statement that "good intent (*apart* from its bearing on the statutory justifications) does not

excuse price discrimination" indicates, as CC itself admits, that evidence of "intent plays some role *at least* with respect to the affirmative defenses." Pet. 6 (emphasis in original). In all events, whatever this sentence may imply in isolation, the following sentence, as noted, plainly establishes that the Seventh Circuit was only expressing "doubt" about the relevance of the "ill intent" evidence, not resolving that issue.[3]

In short, the Seventh Circuit's holding represents the application of settled (and highly deferential) law to the particular facts of this case. It cannot possibly warrant this Court's review.

II. THE "ILL INTENT" EVIDENCE WAS NOT RELEVANT IN THIS CASE; THERE IS NO SPLIT

Even assuming *arguendo* that CC is correct in maintaining that the Seventh Circuit held that "ill intent" evidence was irrelevant, such a holding cannot be gainsaid in this case and does not merit this Court's review. CC claims that the "ill intent" evidence was necessary to establish the competitive injury element of its *prima facie* case (Pet. 9-16), to rebut RJR's meeting competition defense (*id.* at 17-19), and to

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[3] The Seventh Circuit did rule that intent evidence was irrelevant to the specific question whether RJR's price "discounts were [functionally] available to any outlet," including CC. Pet. App. 11a. Such intent evidence, good or bad, was "neither here nor there" on the objective factual question whether the discounts were actually offered to CC. *Id.* Introducing evidence of RJR's benign intent (without impeachment by CC) was nevertheless "harmless" error because the "instructions did not call on the jury to resolve any dispute about the intent with which Reynolds acted." *Id.* at 11a-12a. As discussed in Part II.C *infra*, this "functional availability" ruling is plainly correct and unworthy of the Court's review because no court has suggested that evidence of the seller's subjective intent bears on the objective question whether price discounts are, in fact, offered and therefore functionally available to the buyer.

show that RJR's lower prices were not functionally available to CC (*id.* at 19-20).

None of these claims withstands scrutiny, and none of the cases that CC cites mandates a different result here. Indeed, the central holding of all of those cases, even as interpreted by CC, is that a determination whether intent evidence should be allowed is a "'flexible and pragmatic concept'" which necessarily turns on the particular facts and circumstances of the case. Pet. 18 (quoting *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 441 (1983)); *accord id.* at 21 (quoting *Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160, 163-64 (4th Cir. 1999)). The Seventh Circuit's *application* of that "flexible and pragmatic" standard in circumstances markedly different from the cases cited by CC cannot possibly conflict with those precedents or otherwise set forth a general legal rule meriting this Court's review.

A. Competitive Injury Element

CC devotes eight pages of its petition to the proposition that, in a secondary line (as opposed to primary line) Robinson-Patman Act case, evidence of the seller's intent is relevant to establishing the "last element of the *prima facie* case—that the *effect* of the discrimination may be to injure, destroy or prevent competition." Pet. 10 (citing *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, ___, 126 S. Ct. 860, 869 (2006)) (emphasis added). This convoluted argument is academic since CC in fact satisfied that element of its *prima facie case* with objective evidence relating to competitive effect, and therefore had no need to add evidence of subjective intent.

The Seventh Circuit concluded that CC *successfully* established that "[RJR] sold to other retailers for less than it sold to [CC]," which "threw on [RJR] the burden to establish a justification." Pet. App. 11a. Because CC established the competitive harm element of its *prima facie* case on objective evidence, the result could not have changed even if

the "ill intent" evidence had been admitted. CC thus suffered no conceivable prejudice by being denied the opportunity to gild the lily with the inflammatory "ill intent" evidence.

Indeed, CC seems affirmatively to embrace the Seventh Circuit's view that intent is not an element of a price discrimination *prima facie* showing in secondary line cases. Like the Seventh Circuit, CC believes that "a *mere difference in price* . . . will have the *effect* against which the Robinson-Patman Act is designed to protect," without regard to the seller's *reasons* for the price differential. Pet. 14 (emphases added). Thus, CC's attack amounts to the baffling complaint that, though the Seventh Circuit ruled that CC established a *prima facie* case with objective evidence relating to competitive effect, the court should have also opined that it could have established that case through "intent" evidence, even though resolution of that issue was unnecessary and even though exclusion of such evidence did not prejudice CC in making its case.

In any event, to the extent it matters or is even disputed by CC, it is clear that the competitive injury requirement may be established without any detour into the seller's subjective intent. As this Court noted in *Volvo Trucks*, "a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time." 126 S. Ct. at 870 (citing *Falls City*, 460 U.S. at 435, and *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948)). There was no question that other retailers were receiving lower prices from RJR during the six-year period from 1994 to 2000; indeed, RJR put on extensive evidence that it unsuccessfully made similar offers to CC. *See* p. 4 *supra*. Whether CC "was not given something that its competitor was given" is, as the district court noted, an objective fact that "can be proved . . . every day of the business week in every court in the land, without regard to motivation." RA13. Having shown that other retailers had received lower prices over the six-year period, CC was

entitled to and received the inference of competitive harm described in *Volvo Trucks*. CC was not required also to establish scienter, and the Seventh Circuit was merely stating a truism when it noted that "a bad intent is not *part* of the plaintiff's *prima facie* case under § 13(a)." Pet. App. 11a (emphasis added).

Apart from that fundamental flaw, CC's discussion of the competitive harm, or effect, element is also badly confused and shows no split of authority. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, this Court held that the competitive harm element requires "objective evidence" that the seller's conduct had a real prospect of harming competition "through anticompetitive means"; a subjective "desire" to harm competition does not suffice. 509 U.S. 209, 241 (1993). CC attempts to evade *Brooke Group* by saying that it was a primary line case and its holding applies only in primary line cases. Pet. 13-15. That makes little sense. The question resolved in *Brooke Group* was what type of evidence satisfies the Robinson-Patman Act's competitive harm requirement, and the statutory language is identical for both primary and secondary line cases. *See* 15 U.S.C. § 13(a) (price discrimination must "injure, destroy, or prevent competition").[4] But even accepting *arguendo* that primary line cases are not relevant here, that only serves to hoist CC by its own petard, for it is *primary line* cases upon which CC mainly relies in its attempt to show that intent is relevant in meeting the competitive harm requirement. Pet. 11-12 (citing *Utah Pie Co. v. Cont'l Baking Co.*, 386

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[4] In the Sherman Act context, the law focuses on anticompetitive effect, not commercial animus. *See, e.g., Bus. Elecs. Co. v. Sharp Elecs. Co.*, 485 U.S. 717, 726 (1988). As this Court recently noted in *Volvo Trucks*, "[i]nterbrand competition . . . is the primary concern of antitrust law," and "[t]he Robinson-Patman Act signals no large departure from that main concern." 126 S. Ct. at 872 (internal quotation marks and citation omitted).

U.S. 685 (1967) (primary line case); *Barr Labs., Inc. v. Abbott Labs.*, 978 F.2d 98, 105 (3d Cir. 1992) (primary line case); *Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987) (primary line case)). CC's reliance on these primary line cases is both internally inconsistent and incoherent since they were concededly modified by *Brooke Group*'s subsequent holding on the value of intent evidence in primary line cases. *See* Pet. 13, 16.

The two secondary line cases cited by CC regarding the competitive harm element are patently inapposite. In *Perkins v. Standard Oil Co.*, this Court sustained a jury's finding of competitive harm given the existence of evidence that the challenged price differential allowed the plaintiff's competitor to undercut the plaintiff on the price of gasoline. *See* 395 U.S. 642 (1969). The Court pointed out that the jury's conclusion was supported by evidence that the defendant was "aware that [plaintiff's] business was in danger of being destroyed by [defendant's] discriminatory practices." *Id.* at 649. But finding sufficient evidence to support a jury's verdict is a far cry from saying that subjective intent is always relevant to showing competitive harm. The subjective intent evidence at issue in *Perkins*, moreover, was qualitatively different and substantially more relevant than that at issue here. A seller's acknowledgment that its conduct is causing competitive harm obviously bolsters a claim that such harm occurred. The "ill intent" evidence here, however, does not show that RJR was *aware* that its promotions and discounts caused any competitive harm to CC. In point of fact, most of the intemperate remarks at issue here were made in 1996, the very year that CC was publicly predicting that it would acquire up to 20 percent of the cigarette retail market by 2000. RA1209-10; R.370 ¶ 5. Rather, as the district court found, the "ill intent" evidence was merely an "expression of a thought process, uncoupled with some later conduct" (RA588), and such evidence has no logical relationship to whether competitive harm actually occurred. *Perkins* therefore does not speak to

this case, particularly considering that CC had established its *prima facie* case of competitive harm through objective evidence. Indeed, notwithstanding its earlier claim that the Seventh Circuit's holding "runs directly contrary . . . to the jurisprudence of this Court" (Pet. 8), CC eventually concedes that "this Court has never explicitly addressed the relative importance of the objective versus subjective evidence of a defendant's predatory intent in the context of a *secondary-line* case" (Pet. 16 (emphasis in original)).

In the other secondary line case CC cites, *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp*, the Eighth Circuit upheld a jury's finding of competitive harm based, in part, on evidence that the seller "wanted to cut the number of its dealers in half" and that it "was aware [its] discriminatory practice could destroy [plaintiff's] business." 374 F.3d 701, 712-13 (8th Cir. 2004). That holding is substantively identical to, and no more relevant than, *Perkins*. *Reeder-Simco* suffers from the additional flaw of having been reversed by this Court last Term. *See Volvo Trucks*, 126 S. Ct. at 873 n.4 (rejecting significance of seller's "decision to reduce the number of its dealers" because the "Robinson-Patman Act does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations").

B. Meeting Competition Defense

CC argues that evidence of RJR's subjective desire to harm CC is relevant to the "good faith" aspect of the meeting competition defense. *See* Pet. 17-18. It is undisputed, however, that RJR was facing genuine price competition from Philip Morris through CC and that lowering its prices in response to this threat was prudent and necessary. The fact that RJR's price discounts were needed to meet Philip Morris's competitive pricing is therefore supported not merely by a "good faith" belief, but by compelling evidence. Introducing additional evidence relating to the subjective attitude of certain RJR employees about Philip Morris's

competitive threat would not add anything relevant to RJR's knowledge of, and reaction to, this competitive effect. It would reflect only that, in meeting competition, businesses often are intent on winning the marketplace battle. This hardly detracts from or undermines the objective fact that RJR actually needed to meet, and responded to, competition.

Although CC suggests that the meeting competition defense turns upon the seller's "actual intention" in offering lower prices (Pet. 17), this Court's precedents are clear that the defense is established where the seller "show[s] the existence of *facts* which would lead *a reasonable and prudent person* to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 82 (1979) (internal quotation marks and citations omitted; emphases added); *accord Falls City*, 460 U.S. at 438. Such facts establish "good faith" for purposes of the meeting competition defense, regardless whether they are accompanied by animus towards the competitor. The evidence before the jury here (*see* pp. 2-3 *supra*) showed that RJR took numerous steps to verify, and then match on a retailer-by-retailer basis, the lower prices offered by Philip Morris through its "exclusive" retailers, like CC. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 455 (1978) ("good faith" shown where seller "had received reports of similar discounts from other customers" and made "[e]fforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data"); *accord Great Atl.*, 440 U.S. at 84 n.17. Under this Court's precedents, that is all that RJR needed to show to establish that it was meeting competition.

Indeed, CC *concedes* that RJR faced genuine price competition. In its Seventh Circuit brief, CC acknowledged that "[c]heap Marlboros would force RJR to follow and drop prices on its brands, decreasing RJR's profits." CCBr. 10. And in its petition for certiorari, CC reaffirms that *it* was the source of RJR's price competition: "Because CC sold Philip

Morris's cigarettes for such a low price, CC was threatening RJR's market position, driving down the price RJR would be able to charge other retailers for RJR cigarettes in future." Pet. 5 n.4. Thus, under CC's *own* view of the evidence, CC's alliance with Philip Morris forced RJR to lower its prices to meet competition.

RJR was indisputably responding to "a situation of competitive necessity" as would any "prudent businessman," and accordingly met the "good faith" requirement of the meeting competition defense. *Falls City*, 460 U.S. at 441. That "complete defense," *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951), is not somehow lost simply because the competition being met was so intense that it also engendered harsh comments by employees of the seller. Even CC acknowledges that such "ill intent evidence" can be "dismiss[ed]" as a "spirited rivalry when directed at a *competitor*." Pet. 5 n.4 (emphasis in original). But, of course, a seller can have a "spirited rivalry" with those, like CC, who align themselves with the seller's principal competitor to engage in price discounts. The "spirited rivalry" evidence here should therefore similarly be dismissed as the natural byproduct of an intense effort to meet competition. CC cannot cite a single case endorsing its view that "ill intent" evidence can invalidate a "meeting competition" defense where, as here, the seller is actually responding to genuine price competition.

Indeed, the Fourth Circuit case cited by CC (Pet. 20-22) as supposedly creating a split, *Hoover Color*, plainly establishes that acting to meet competition is a complete defense, *regardless* of the seller's intent or motives. The court there reversed a grant of summary judgment for the seller based upon the meeting competition defense because the plaintiff had offered evidence that the seller's "sole" motive was "not to meet a competitor's price, but rather to develop . . . large volume of sales." 199 F.3d at 167. The Fourth Circuit recognized that a jury could ultimately find that the seller acted to meet competition *and* to increase its volume of

sales, in which case the seller would win. *See id.* But it could not sustain the grant of summary judgment because "a fact-finder could reasonably conclude" that the seller offered lower prices "*simply* to grow its business." *Id.* (emphasis added); *see also id.* at 168 (explaining that "a factfinder could reasonably determine that [seller] did not need or intend the volume discounts to match competing offers"). *Hoover Color* thus stands for the commonsensical notion that where there is evidence to show that the seller was in fact matching the lower price of a competitor, the meeting competition defense prevails, even if the seller had additional reasons for lowering its price. The Fourth Circuit made plain that the plaintiff could win at trial only if the "sole" basis for reducing price was unrelated to price competition. Since the evidence here concededly showed that RJR was matching Philip Morris's prices, it satisfied the Fourth Circuit's test because such price competition was at least part of the reason for the differential pricing.[5]

CC submits that this is one of those rare cases noted in *Falls City* where, "'despite the availability from other sellers of a low price, it may be apparent that the defendant's low

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[5] Both *Hoover Color* and *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990), the other circuit court decision allegedly creating a split on the meeting competition defense (discussed further on p. 22 *infra*), involved summary judgment motions, not jury verdicts. Those decisions are therefore distinguishable in that the courts of appeals were reviewing the evidence *de novo* and drawing all inferences in favor of the non-movant plaintiffs. *See generally Barr Labs.*, 978 F.2d at 105 (noting that "complex antitrust litigation infrequently merits summary judgment because of its fact-intensive nature"). Here, in contrast, there was a five-week trial and the jury granted judgment to RJR. As the verdict holder, RJR is entitled to have the evidence and all reasonable inferences therefrom viewed in its favor, *see Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944), and there was abundant evidence showing that RJR was responding to the price competition of Philip Morris. Thus, the facts, posture, and standard of review in this case are materially different from those in *Hoover Color* and *Alan's of Atlanta*.

price was not a good faith response.'" Pet. 18 (quoting *Falls City*, 460 U.S. at 439). CC reads the quoted language as allowing a plaintiff to rebut a valid meeting competition defense where the seller "had some ulterior motive" in lowering its price. Pet. 18. It does no such thing. As the Court explained in the next sentence of the *Falls City* opinion, *see* 460 U.S. at 440, the quoted language was a reference to the holding in *FTC v. A.E. Staley Manufacturing Co.*, 324 U.S. 746 (1978), which is not remotely applicable here. The sellers in *Staley* were found to be lowering their prices not as part of any actual price competition, but rather as part of a price fixing conspiracy under which low prices were set in some areas in order to establish artificially high prices elsewhere. *Id.* at 756. The *Staley* Court accordingly held that the sellers' "price discriminations were not made to meet a 'lower' price and consequently were not in good faith." *Id.* at 758. As this Court further explained in *Falls City*, there was no "good faith" in *Staley* because the sellers' low prices "could be seen *only* as part of a collusive pricing system designed to exact artificially high prices throughout the country." 460 U.S. at 440 (emphasis added). The quoted language in *Falls City* thus refers to situations in which there is no price competition at all, and the meeting competition defense is instead being used as a pretext to conceal or otherwise justify conspiratorial conduct. The Eleventh Circuit case cited by CC (Pet. 22-24) is plainly distinguishable for the same reason. *See Alan's of Atlanta*, 903 F.2d at 1417 (reversing grant of summary judgment for seller where district court "chose to ignore" plaintiff's evidence that the seller thought that its pricing scheme "bordered on illegality" and therefore instructed relevant employees "to be familiar with three contrived explanations for their actions" in order "[t]o avoid legal troubles"). In any event, as noted, RJR's alleged hostility towards CC was not "ulterior" to RJR's need to meet its competitor's price discounts—it *stemmed* from this competition.

In short, neither *Falls City* nor any other case that CC cites stands for the proposition that the meeting competition defense is unavailable to a seller that responded to actual price competition simply because the seller's employees happened to have resented the fact that the seller had to lower its prices. Such a rule would, indeed, be perverse, since competitive animus is most likely to be found where price competition is fiercest. The greater the price competition in an industry, the lower the profit margins, the greater the stress on management, and the more likely that some employees will develop contempt for their competitors, even as those employees are responding to the competition with lower prices. In the end, of course, the lower prices that stem from the competition in such industries are good for consumers, the ultimate beneficiaries of antitrust laws. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990). And the rule advocated by CC would serve only to deter participants in such markets from meeting competition with lower prices. Under CC's view of the law, even a seller responding to intense price competition would be defenseless against a Robinson-Patman Act claim if it turned out—after a team of lawyers had scoured all of the seller's internal memoranda—that some of the seller's employees had expressed hostility toward the competition. *Cf.* Pet. App. 16a ("A large firm such as [RJR] with thousands of employees, generates mountains of internal paper. Some of those employees are bound to take almost any view about almost every subject."). Such a rule cannot be squared with this Court's admonition that the "heart of our national economic policy long has been faith in the value of competition" and "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor." *Standard Oil*, 340 U.S. at 249.

C. Functional Availability

CC argues that it should have been permitted to use the "ill intent" evidence to somehow help establish that RJR's price discounts were not functionally available to it. *See* Pet. 19-20. The question of functional availability, however, turns on whether the discount that the seller gave to others was in fact available to the plaintiff. *See, e.g., Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 326 (5th Cir. 1998) ("[A] price discount equally available to all purchasers . . . is not price discrimination."); *accord Shreve Equip.*, 650 F.2d at 105. Whether the seller made an offer, and what the terms and conditions of that offer were, are knowable facts. There was ample evidence here that RJR made repeated offers that CC just as repeatedly rejected. *See* p. 4 *supra*. RJR's internal attitudes about CC cannot in any way affect those objective facts. Such intent evidence does not bear on whether an offer was made or on CC's reasons for rejecting it in favor of "Philip Morris exclusive" contracts, and is therefore plainly irrelevant to whether the offer was available.

There is, in any event, no split of authority on this question. Contrary to CC's assertion, this Court in *Morton Salt* made no reference whatever to whether the seller "actually intended to sell" (Pet. 19), but rather considered whether all customers, given their relative sizes, could, as a matter of fact, take advantage of the seller's volume discount offer. *See Morton Salt*, 334 U.S. at 42-43 (holding that quantity-based discounts were "[t]heoretically available to all" but "functionally they [we]re not" because some customers "made purchases in such small quantities that they could not qualify for any of [seller]'s discounts"). The only other case cited in this regard—an unpublished district court decision (Pet. 20)—is also notably silent about intent. Indeed, that court, like the Court in *Morton Salt*, looked at the "structure" of the promotional program to determine its functional availability. *Hygrade Milk & Cream Co. v.*

Tropicana Prods., Inc., No. 88 Civ. 2861 (SAS), 1996 WL 257581, at *7 (S.D.N.Y. May 16, 1996).

Although CC contended below that it should have been able to impeach RJR's evidence of its willingness to contract with CC, that factbound issue is obviously not worthy of this Court's review. Moreover, as the Seventh Circuit correctly ruled, whatever error the district court committed in allowing RJR's "good intent" evidence, it was plainly harmless because the "instructions did not call on the jury to resolve any dispute about the intent with which [RJR] acted." Pet. App. 11a-12a.

* * *

In all events, even assuming *arguendo* that the Seventh Circuit erred in assessing the relevance of intent evidence to some of the issues and defenses implicated in this case, any such ruling would necessarily be factbound and inherently unworthy of this Court's review. The opinion below contains no general discussion about the permissibility or relevance of subjective intent evidence under the Robinson-Patman Act, much less any clear rule completely barring such evidence under the Act. Thus, even if the opinion ruled that such evidence was irrelevant (as opposed to being properly excluded under Rule 403), that holding is necessarily case-specific and cannot reasonably be interpreted as broadly prohibiting intent evidence in all circumstances. Consequently, the opinion below contains no general legal principle warranting review, and certainly no principle in conflict with the holdings of other lower courts or this Court. To the contrary, even under CC's interpretation, these other cases stand, at most, for the proposition that the "'facts and circumstances of a particular case'" determine whether intent evidence is relevant. Pet. 21 (quoting *Hoover Color*, 199 F.3d at 163-64). Accordingly, any application of that flexible standard by the Seventh Circuit is consistent with the cases relied upon by CC and none of those cases involved facts remotely analogous to

those present here. Thus, the Seventh Circuit did not either announce a legal rule, or even apply a legal principle in a manner, which conflicts with a decision of this Court or any other federal court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 18, 2007

Supreme Court, U.S.
FILED

06-848 DEC 14 2006

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

CIGARETTES CHEAPER!,

Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY

AND

GMB, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Explanatory Statement To The Supplemental Appendix i

Amended Judgment In A Civil Case, *R.J. Reynolds Tobacco Co., et al. v. Cigarettes Cheaper!, et al.*, No. 99 C 1174 (N.D. Ill. Feb. 8, 2005) 1b

EXPLANATORY STATEMENT TO THE SUPPLEMENTAL APPENDIX

There is no written opinion from the district court with respect to the question presented in Cigarettes Cheaper!'s Petition for a Writ of Certiorari. The Amended Judgment in a Civil Case that follows (1b-2b) contains, in the second enumerated order, the entry of judgment against Cigarettes Cheaper! based on the jury verdict at trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTHERN ILLINOIS,
EASTERN DIVISION

R.J. REYNOLDS TOBACCO CO., ET AL,

VS.

CIGARETTES CHEAPER! ET AL,

AMENDED JUDGMENT INA CIVIL CASE

CA No: 99 C 1174.

MICHAEL W. DOBBINS, CLERK OF COURT

STEPHEN C. TOKOPH, DEPUTY CLERK

ENTERED
February 8, 2005

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Judgment is hereby entered in favor of R.J. Reynolds Tobacco Company and GMB, Inc., and against Cigarettes Cheaper! on Counts I, II, III, IV, V and VI of R.J. Reynolds Tobacco Company and GMB, Inc.'s complaint in the amount of $3,560,002.00. R.J. Reynolds Tobacco Company and GMB, Inc. are awarded prejudgment interest in the amount of $1,313,706.00. Interest shall accrue on the combination of these two amounts at a rate of 2.47%, compounded annually.

2. Judgment is entered in favor of Counter-Defendant R.J. Reynolds Tobacco Co. and against Counter-Plaintiff Cigarettes Cheaper! on Cigarettes Cheaper!'s counterclaim. Cigarettes Cheaper to take nothing.

3. R.J. Reynolds Tobacco Company and GMB, Inc. are hereby awarded $117,855.23 in costs.

4. Defendants C.E.T., International, Inc., Canstar (USA), Inc., Genova Trading, Inc., and all John Does are dismissed with prejudice.

All matters in controversy having been resolved, final judgment is hereby entered in favor of R.J. Reynolds Tobacco Company and GMB, Inc., and against Cigarettes Cheaper! in the amount of $4,873,708.00.

For the Court,

/s/Stephen C. Tokoph,
Deputy Clerk

FILED
JAN 29 2007
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SUPREME COURT, U.S.

No. 06-848

In the Supreme Court of the United States

CIGARETTES CHEAPER!,

Petitioner,

V.

R.J. REYNOLDS TOBACCO COMPANY

AND

GMB, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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RULE 29.6 STATEMENT

Petitioner Cigarettes Cheaper!, a California corporation, has no parent corporation, and no publicly held company holds 10% or more of Cigarettes Cheaper!'s stock.

TABLE OF CONTENTS

RULE 29.6 STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

ARGUMENT 1

I. THE DECISIONS BELOW REST UPON THE ASSUMPTION THAT INTENT EVIDENCE HAS NO PROBATIVE VALUE UNDER THE RPA, CONTRADICTING THE TEXT OF THE STATUTE AND THE CASE LAW INTERPRETING IT. 1

A. RJR Admits Intent Evidence May Be Used To Establish Harm to Secondary-Line Competition. 2

B. RJR Ignores the Element of the "Meeting Competition" Defense Requiring That Discriminatorily Lower Prices Be Offered *In Good Faith* and *For the Purpose* of Meeting Competition. 5

II. THE SEVENTH CIRCUIT'S DECISION CONTRADICTS THE SETTLED LAW OF THE OTHER CIRCUITS. 7

A. RJR Fails to Distinguish the Fourth Circuit's Opinion in *Hoover Color v. Bayer*. 7

B. RJR Barely Addresses the Eleventh Circuit's Opinion in *Alan's of Atlanta v. Minolta* 8

C. RJR Disregards the Continuing Validity of the Relevant Portions of the Eighth Circuit's Opinion in *Reeder-Simco GMC. v. Volvo* 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Alan's of Atlanta, Inc. v. Minolta Corp.,
903 F.2d 1414 (11th Cir. 1990) 8, 9

Barr Labs. v. Abbott Labs.,
978 F.2d 98, 108 (3d Cir. 1992) 3

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 3

Brown v. Wainwright,
785 F.2d 1457 (11th Cir. 1986) 4

Falls City Indus. v. Vanco Beverage, Inc.,
460 U.S. 428 (1983) 6

FTC v. Morton Salt Co.,
334 U.S. 37 (1948) 6

Henry v. Chloride, Inc.,
809 F.2d 13344 (8th Cir. 1987) 3

Hoover Color Corp. v. Bayer Corp.,
199 F.3d 160 (4th Cir. 1999). 7, 8

Perkins v. Standard Oil Co.,
395 U.S. 642 (1969) 3, 10

Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.,
374 F.3d 701 (8th Cir. 2004) 9, 10

United States v. Lewis,
693 F.2d 189 (D.C. Cir. 1982) 4

Volvo Trucks N. Am., Inc. v. Reeder-Simco, Inc.,
546 U.S. 164, __, 126 S. Ct. 860 (2006) 10

STATUTES

15 U.S.C. § 13 ..... *passim*

RULES

Federal Rule of Evidence 403 ..... 1, 2, 4

ARGUMENT

In its Petition for a Writ of Certiorari ("Petition"), Cigarettes Cheaper! ("CC") asks the Court to address the circuit split created by the Seventh Circuit's misinterpretation of the Robinson-Patman Act ("RPA"), 15 U.S.C. § 13. R.J. Reynolds Tobacco Company ("RJR") tries to recast the Petition as a request to review an evidentiary ruling under Federal Rule of Evidence 403 ("Rule 403"). CC's Petition is nothing of the sort. The Seventh Circuit affirmed the lower court's exclusion of *all* evidence of RJR's ill intent, reasoning that such evidence has little or *no relevance* to either CC's *prima facie* case under § 2(a) of the RPA or the affirmative defenses under that statute. When it decided that ill intent evidence has no probative value, the Seventh Circuit did much more than merely affirm the lower court's miscalculation of the Rule 403 analysis. Rather, the Seventh Circuit rewrote the antitrust laws in contravention of the RPA's plain language, disregarded this Court's precedents, and created a significant split among the Circuits. This Court's certiorari jurisdiction is invoked not to review an evidentiary ruling, but to resolve a split among the Circuits regarding whether subjective intent evidence has any relevance at all under the RPA.

I. THE DECISIONS BELOW REST UPON THE ASSUMPTION THAT INTENT EVIDENCE HAS NO PROBATIVE VALUE UNDER THE RPA, CONTRADICTING THE TEXT OF THE STATUTE AND THE CASE LAW INTERPRETING IT.

While the district court and Seventh Circuit characterized their respective decisions as resting upon Rule 403, neither court in fact engaged in the analysis called for by that rule. As the opinions below reveal, neither court actually weighed the probative value of the intent evidence against its potential for unfair prejudice because both courts first decided that the intent evidence had ***no*** probative value

in the context of an RPA claim. *See* Pet. App. at 11a ("A bad intent is not part of the plaintiff's *prima facie* case under § 13(a) and a "good" intent...does not excuse price discrimination."); *id.* ("Even if marginally relevant to some issue (which we doubt)...[intent evidence] could have played little role beyond confusing jurors[.]"); *id.* ("The district judge should have kept *all* claims about motive or intent out of evidence[.]"); SA885 (the district court on ill intent's relevance: "No, no, I agree [the ill intent evidence] is not relevant to the elements of the claim[.]"); RA 587 ("Ill-will evidence would add little, if any, probative value to the existing evidentiary record."); RA589 ("It is either not relevant or so marginally relevant...as to not override *its* ***probative value****, which is virtually, I think,* ***non-existent.***") (emphasis added).

The legal decision that subjective intent evidence *has no probative value* under the RPA, which predetermines the outcome of any subsequent Rule 403 analysis, is the "Question Presented" in CC's Petition. When an erroneous interpretation of law places one federal Circuit squarely at odds with the other Circuits, a writ is appropriate. The Seventh Circuit's decision that intent evidence has no probative value is incorrect as a matter of law, and this erroneous interpretation of federal law pervades its opinion.

A. RJR Admits Intent Evidence May Be Used To Establish Harm to Secondary-Line Competition.

In its Petition, CC demonstrated that the Seventh Circuit departed from the law of this Court and other federal Circuits in reasoning that evidence of a seller's intent is irrelevant to establishing the requisite threat to secondary-line competition in a *prima facie* RPA case. *See* Pet. at 9-16. RJR concedes, as it must, that intent evidence is relevant to this element of the *prima facie* case: "A seller's acknowledgment that its conduct is causing

competitive harm *obviously* bolsters a claim that such harm occurred." Opp. at 17 (emphasis added). RJR then attempts to distinguish the evidence of its intent to harm CC as "qualitatively different" than that presented in cases such as *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), arguing that evidence of *its intent* to "kill CC" is only relevant if RJR is "aware" it is succeeding in its efforts. SA22; Opp. at 17.[1] But this is not the law. Courts have long recognized that subjective evidence of predatory *intent* may establish the existence or likelihood of competitive harm. *See, e.g., Barr Labs. v. Abbott Labs.*, 978 F.2d 98, 108 (3d Cir. 1992) ("In the absence of market data indicating actual competitive injury, a plaintiff may sometimes substitute evidence of a competitor's predatory intent from which competitive injury can be inferred."); *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1344 (8th Cir. 1987) (explaining "an illicit intent accentuates the probability that a prohibited consequence will come to pass") (quotation and citation omitted).[2]

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[1] Indeed, RJR undoubtedly *was* aware of the anti-competitive effects its actions had. *See, e.g.*, SA221 ("[O]ne [Von's] store (274) has had the Cigarettes Cheaper! format close down" and RJR's program "undoubtedly helped the process"); SA5 (knowledge that tactics would "Punish," "Hurt," or "Stop" CC); SA22 (knowledge that tactics would "kill them [CC]"); SA35 (tactics would "Kill [CC] On The Beach"); SA189 (plans to "use [CC's] weaknesses to defeat the Cigarettes Cheaper! stores"); SA231 (discriminatory discounts were "the ammo to take these [CC] stores down").

[2] RJR argues that CC should not be permitted to rely upon RPA cases involving primary-line competition decided before *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 251 (1993), because the Court held in *Brooke Group* that the existence of predatory intent could be established through examination of objective data in primary-line cases (*i.e.*, whether the defendant was pricing below cost). Opp. at 16-17. However, the reasoning in *Barr Labs* and *Henry* with respect to the use of subjective evidence remains valid and applicable to secondary-line cases, despite the holding in *Brooke Group*, because objective measures of predatory intent are not available in secondary-line cases. *See* Pet. at 13-14. The lower federal courts have not developed an

Having admitted that subjective evidence of its anti-competitive intent is relevant, RJR argues the Seventh Circuit was nonetheless justified in affirming the district court's exclusion of the subjective evidence. According to RJR, any error in excluding this evidence was harmless because CC made its *prima facie* case without it. Opp. at 13-15. This assertion, however, misses the point of CC's Petition. The Petition takes issue with the Seventh Circuit's determination that such evidence has no probative value and "could have played little role beyond confusing jurors[.]" Pet. App. at 11a. Other Circuits have established this type of evidence *has* probative value under § 2(a), and the Seventh Circuit is the only Circuit to declare otherwise.

Furthermore, RJR provides no support for the bald assertion that once a plaintiff proffers evidence sufficient to sustain its *prima facie* case, the relevance of additional evidence to strengthen that case is automatically diminished or nullified. Opp. at 10, 14-15. By definition, evidence cannot be excluded as cumulative under Rule 403 if it establishes a new fact. *United States v. Lewis*, 693 F.2d 189, 195 (D.C. Cir. 1982); *Brown v. Wainwright*, 785 F.2d 1457, 1466 (11th Cir. 1986). In this case, the excluded evidence established a new fact that would have strengthened CC's case – *i.e.*, RJR's express goal of putting CC out of business. Thus, while CC may have been able to establish the "competitive injury" aspect of its § 2(a) claim with only objective evidence, the Seventh Circuit's wholesale exclusion of evidence of RJR's intent to cause competitive injury – relevant evidence in this Court and the other federal Circuits – is a misinterpretation of federal law requiring this Court's review.

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objectively measurable evidentiary proxy for determining whether the defendant's actions were predatory in nature. *See* Pet. at 13-15.

B. RJR Ignores the Element of the "Meeting Competition" Defense Requiring That Discriminatorily Lower Prices Be Offered *In Good Faith* and *For the Purpose* of Meeting Competition.

RJR admits its case hinged, in large part, upon its ability to convince a jury that it was "meeting competition" when it offered lower prices to CC's competitors. Opp. at 5. In fact, RJR's Opposition spends *two pages* detailing the voluminous amounts of evidence RJR was permitted to introduce regarding the offers it made to CC's competitors and the reasons for those low-price offers. *Id.* at 2-4. The lengthy presentation of this pivotal evidence exemplifies the problem created by the district court's ruling – while RJR was permitted to introduce evidence of its motivation and intent in offering lower prices to CC's competitors, CC was *not permitted* to introduce evidence rebutting RJR's purported motivation and intent with respect to such offers. Pet. at 3-6; Pet. App. at 11a. And though the Seventh Circuit opined that "[t]he district judge should have kept *all* claims about motive or intent [including RJR's] out of evidence," *id.*, the court failed to recognize the extreme prejudice in allowing one party to present evidence on this element of the defense without permitting the other party to present evidence in rebuttal or to impeach. *Id.* at 12a (calling any such error "harmless").

RJR argues that the inquiry of the meeting competition defense is a wholly *objective* one – that a seller need only establish a general awareness of price competition in a particular market to justify discrimination. *See* Pet. App. at 11a-12a; Opp. at 19-20. Not only is this in contravention to the plain language of the statute, *see* 15 U.S.C. § 13(b) (affording sellers a shield from price discrimination claims provided the lower prices were offered "*in good faith* to meet the equally low price of a competitor") (emphasis added), but it also directly contradicts this Court's precedent. *Falls City Indus. v. Vanco Beverage,*

Inc., 460 U.S. 428, 438-39 (1983). In *Falls City*, this Court explicitly held that the "good faith" aspect of the "meeting competition" defense includes a subjective element "requir[ing] that the seller offer the lower price in good faith *for the purpose* of meeting the competitor's price." *Id.* (emphasis in original). The mere objective existence of a competitor's lower price does not satisfy the statute or justify the discrimination. If CC had been permitted to introduce the evidence excluded by the district court, it would have been clear to the jury that RJR was not acting "in good faith" for the purpose of meeting competition but was instead attempting to "kill CC" – a company that was not even RJR's competitor, but a retail distributor. SA22. Had the Seventh Circuit followed the accepted principle that subjective evidence is relevant to the inquiry under § 2(b), the deception in which RJR engaged by pretending to "meet competition" while instead acting to eliminate CC, would have been exposed. [3]

---

[3] Similarly, RJR claims that the inquiry under the "functional availability" defense is a wholly objective one and that the evidence of RJR's subjective intent, as revealed through documents authored by the very individuals making the allegedly "good faith" offers to CC, "would add little, if any, probative value[.]" RA587; Opp. at 7, 24. But the case law establishing this affirmative defense draws no such distinctions or restrictions regarding the "objective" or "subjective" nature of the evidence leading to the conclusion that the discounts were not "functionally available." *See FTC v. Morton Salt Co.*, 334 U.S. 37, 41-43 (1948). Though at trial, as the district court stated, each side had been able "to present its position, in terms of what was done, what was said, and what was offered and was not offered," RA 588, a jury would have examined the purportedly legitimate (objective) offers made by RJR with significantly more scrutiny had the jury been aware of RJR's (subjective) desire to eliminate CC. This Court has long recognized that evidence the lower price was not truly being made available to the disfavored purchaser will preclude application of the "functional availability" defense. *See, e.g., Morton Salt*, 334 U.S. at 41-43.

II. THE SEVENTH CIRCUIT'S DECISION CONTRADICTS THE SETTLED LAW OF THE OTHER CIRCUITS.

RJR's Opposition obfuscates the true meaning and impact of the Seventh Circuit's opinion and strives to make it appear that no circuit split results from that opinion. RJR is incorrect.

A. RJR Fails to Distinguish the Fourth Circuit's Opinion in *Hoover Color v. Bayer*.

RJR mounts its most vigorous assault against the Fourth Circuit's decision in *Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160 (4th Cir. 1999). First, RJR claims "*Hoover Color* plainly establishes that acting to meet competition is a complete defense, *regardless* of the seller's intent or motives." Opp. at 20. Yet this is clearly not so. As RJR acknowledges in the very next sentence of its brief, a factual question about the seller's motive drove the Fourth Circuit to hold the seller was *not* entitled to the defense as a matter of law. Opp. at 20. Thus, the Fourth Circuit's *Hoover Color* decision plainly establishes that a seller's intent or motive is of significant probative value in applying § 2(b) of the RPA. Second, RJR reads *Hoover Color* to establish the principle that so long as "some evidence" shows the seller was matching a competitor's price, "the meeting competition defense prevails, even if the seller had additional reasons for lowering its price." Opp. at 21. Were this true, *Hoover Color* would have been decided the other way. The Fourth Circuit specifically cited "some evidence" in support of the seller's argument that it was just matching a competitor's price, *Hoover Color*, 199 F.3d at 166, and referred to evidence of the seller's "additional reasons" for lowering its prices – reasons unrelated to price competition – to divest the seller of the judgment it obtained in the district court under § 2(b). *Id.* at 167-68.

Finally, RJR argues *Hoover Color* is inapposite because "the evidence here concededly showed that RJR

was matching Philip Morris's prices." Opp. at 21. Of course the evidence in this case showed as much because the Seventh Circuit, based on a misinterpretation of § 2(b), excluded all evidence to the contrary, deeming irrelevant RJR's intent to discriminate in price in order to "defeat the Cigarettes Cheaper! stores." SA189. The Seventh Circuit thus dismissed evidence of an "alternative motive," which the Fourth Circuit would find *highly relevant* to the "meeting competition" defense. *Hoover Color*, 199 F.3d at 164, 167. In attempting to distinguish *Hoover Color*, then, RJR emphasizes the Seventh Circuit's conflict with appellate jurisprudence under § 2(b) of the RPA.

B. RJR Barely Addresses the Eleventh Circuit's Opinion in *Alan's of Atlanta v. Minolta*.

RJR devotes only a footnote to *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990). Opp. at 21 n.5. In *Alan's of Atlanta*, the Eleventh Circuit noted that the plaintiff had disputed the defendant's claims regarding its "good faith" effort to meet the grey market competition, but that the district court had accepted the defendant's "testimony in toto" and ignored the plaintiff's disputation (much in the same manner that CC's proffered evidence was deemed irrelevant and inadmissible by the district court). *Alan's of Atlanta*, 903 F.2d at 1424-25. Among the inquiries cited by the Eleventh Circuit as posing genuine issues of fact for the jury to consider were "the good faith nature of the alleged investigation Minolta made into grey market conditions, the propriety of its rather generalized response to the purported competition, and the actual *purpose* which lies behind its price discrimination." *Id.* at 1425 (internal citations omitted). In reversing the grant of summary judgment, the Eleventh Circuit, in contrast to the Seventh Circuit, held that evidence of the defendant's actual intent or purpose in discriminating among retailers is relevant to whether it has established the "meeting competition" defense. In attempting to distinguish *Alan's of Atlanta* on the basis that it involved

summary judgment instead of a jury trial, RJR fails to recognize that the substantive holding of *Alan's of Atlanta* – that intent evidence is relevant to the "meeting competition" defense given the "good faith" aspect of § 2(b) – remains constant irrespective of whether the case is being considered by the court on summary judgment or by a jury at trial. *Id.* Thus, despite RJR's contention to the contrary, *Alan's of Atlanta* illustrates the circuit split created by the Seventh Circuit.

C. RJR Disregards the Continuing Validity of the Relevant Portions of the Eighth Circuit's Opinion in *Reeder-Simco GMC. v. Volvo.*

RJR's attempt to distinguish the Eighth Circuit's decision in *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701 (8th Cir. 2004), *rev'd on other grounds*, 546 U.S. 164 (2006), also falls short. *Reeder-Simco*, a secondary-line case, holds that evidence of a defendant's intent can be used to prove the competitive injury element of the *prima facie* case. *Id.* at 711. To establish a *prima facie* case under § 2(a) of the RPA, a plaintiff is allowed to introduce "evidence that disfavored competitors lost sales or profits as a result of the discrimination" or the defendant *wanted* to eliminate certain dealers by reducing those dealers' sales and profits. *Reeder-Simco*, 374 F.3d at 711-12. As the Eighth Circuit recognized in *Reeder-Simco*, one way of implementing a plan to reduce the number of dealers is to cause losses for the disfavored dealers, and "the jury could properly infer Volvo's intent to reduce the number of its dealers manifested itself in the discriminatory concession practices." *Id.* at 712. This is the same inference that CC was entitled to present to the jury by way of the subjective evidence of RJR's intent – *i.e.*, that RJR's goal of eliminating CC led to illegal discrimination under the RPA.

RJR's attempt to distinguish this case amounts to little more than the assertion that *Reeder-Simco* is "substantively identical to, and no more relevant than,

Perkins." Opp. at 18. *Perkins*, however, a Supreme Court case establishing the relevance of subjective intent evidence to a *prima facie* case under § 2(a) of the RPA, *is highly relevant* to the inquiry at hand. *Perkins*, 395 U.S. at 649; Pet. at 12-13. The fact that the Eighth Circuit is still following *Perkins* nearly forty years after the decision was rendered (and despite more recent decisions concerning the value of similar evidence in *primary-line* cases), reflects not only the continuing vitality of the *Perkins* opinion, but also the circuit split the Seventh Circuit provoked in this case.

RJR's only "legal" argument against *Reeder-Simco* is that it was "reversed by this Court." Opp. at 18. CC, however, acknowledged this reversal in its Petition, *see* Pet. at 13 n.5, 24-25, noting that this Court made clear it was reversing the Eighth Circuit's decision solely on a basis inapplicable to this case, namely that the RPA did not reach a particular competitive situation. *Volvo Trucks N. Am., Inc. v. Reeder-Simco, Inc.*, 546 U.S. 164, __, 126 S. Ct. 860, 870-73 (2006). Moreover, the Court's comment in that opinion regarding a company's discretion to control the size of its dealer network (cited by RJR) has no application to the circumstances of this case or effect upon the basic premise that competitive harm may be inferred from an intent to *eliminate* a buyer of one's products. Thus, this Court's *Volvo Trucks* opinion leaves undisturbed the Eighth Circuit's conclusion that a seller's predatory intent is relevant to the "competitive injury" aspect of § 2(a) – a principle the Seventh Circuit ignored in this case.

CONCLUSION

The Seventh Circuit's opinion in this case evinces a fundamental misunderstanding of the RPA, and review is needed to ensure the integrity of the statute's plain language, to preserve this Court's precedent, and to resolve this newly-created split between the federal Circuits on an important question of antitrust law.

Respectfully submitted,

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